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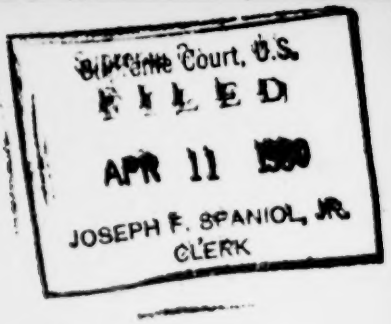

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

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QUESTION PRESENTED FOR REVIEW

Where plaintiffs join in state court a claim for violation of First Amendment rights under 42 USC §1983 and a claim for violation of the state constitution arising out of the same nucleus of operative fact, where the federal claim is substantial, and where the state court fails to reach the federal claim because plaintiffs prevail on the state constitutional claim, are plaintiffs "prevailing parties" entitled to attorney fees under 42 USC §1988?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of Oregon entered January 11, 1990.

OPINIONS BELOW

The opinion of the Oregon Supreme Court below is reported at 308 Or 531 (1989). The decision of the Oregon Court of Appeals is reported at 94 Or App 478, 766 P2d 408 (1988).

JURISDICTION

The Oregon Supreme Court issued its decision below on November 30, 1989. The Oregon Supreme Court issued its decision denying reconsideration on January 11, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the United States Constitution provides, in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties

> made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Article VI, Paragraph 2.

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1983 of Title 42 of the United States Code provides, in relevant part, as follows:

> Every person who, under color of any statute... of any State... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 USC §1983. Title 42, §1988 provides, in relevant part, as follows:

> In any action or proceeding to enforce a provision of [Section]... 1983... of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 USC §1988.

Article I, Section 8 of the Oregon Constitution provides:

> No law shall be passed restraining the free expression of opinion or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

At the time this action was initially filed in 1985, Oregon Revised Statutes Section 181.400(2) provided, in relevant part, as follows:

> Notwithstanding any other law, no member of the state police shall in any way be active or participate in any political contest of any general or special election, except to cast the ballot of the member of the state police.

Because of the decisions below, that statute has been declared unconstitutional and is no longer in force.

STATEMENT OF THE CASE[1]

Plaintiffs[2] brought this action in the Oregon trial court of general jurisdiction for a declaration that Oregon Revised Statute (ORS) 181.400(2) violated Article I, Section 8 of the Oregon Constitution and the First Amendment to the United States

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[1] The facts relevant to this petition are uncontested and, except as otherwise noted, are taken from the Oregon Supreme Court's November 30, 1989 Opinion.

[2] Plaintiff Oregon State Police Officers Association is an association of approximately 650 state police troopers responsible state-wide for enforcing the traffic and criminal laws. Plaintiff Beck is president of the Association. The result in this case affects approximately 300 additional police officers of the rank of sergeant and above who are not members of the Association but whose political rights were restricted by ORS 181.400(2).

Constitution.[3] The state statute prohibited all political activity by state police officers other than voting. Plaintiffs asked the state court for a declaration that the statute violated the state and federal constitutions and for an injunction against its enforcement. Plaintiffs brought their federal claim under 42 USC §1983. Plaintiffs also claimed entitlement to reasonable attorney fees under 42 USC §1988 on their federal claims and under ORS 182.090 on their state claims.[4]

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[3] Plaintiffs also claimed violation of their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution, a contention the trial court upheld but which the appellate courts found it unnecessary to reach.

[4] ORS 182.090 provides, in relevant part:

> In any civil judicial proceeding involving as adverse parties a state agency...and a petitioner, the court shall award the petitioner reasonable attorney fees and reasonable expenses if

This action was filed in August, 1985.[5] Plaintiffs' counsel agreed to take the case on a contingent fee basis, accepting as payment whatever attorney fees would be awarded should plaintiffs prevail.

Plaintiffs prevailed in the trial court, and both the state statute and departmental regulations construing it were found to violate Article I, Section 8 of the Oregon Constitution and the First Amendment to the

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the court finds in favor of the petitioner and also finds that the state agency acted without a reasonable basis in fact or in law.

[5] Defendants in their answer generally denied plaintiffs' claims including their claim for attorney fees under 42 USC §1988. In their trial memorandum in July 1987, defendants opposed plaintiffs' attorney fee request on the ground that plaintiffs had failed to give notice of tort claim and on the ground that the plaintiff, State Police Association, could afford to pay its own attorney fees. Neither of these grounds was orally argued to the trial court or presented to either of the appellate courts in this case.

United States Constitution. The trial court enjoined enforcement of ORS 181.400(2).

As prevailing parties, plaintiffs petitioned for an award of attorney fees after trial. The trial court denied fees on the state con-stitutional claim[6] but allowed attorney fees in the amount of $25,470 under 42 USC §1988.

The state appealed the trial court judgment to the Oregon Court of Appeals, contending that the trial court had erroneously stricken the state political action statute and regulations and had erroneously awarded attorney fees because plaintiffs should not have prevailed and their federal claims were

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[6] To qualify for an award of attorney fees under the state statute, ORS 182.090(1), plaintiff would have had to show that defendant's position in the case was "without reasonable basis in fact or law".

not substantial.[7]

The Oregon Court of Appeals rejected the state's contentions, holding the state political action statute and department regulations unconstitutional under Article I, Section 8 of the Oregon Constitution. 94 Or App 478, 483, 766 P2d 408, 410. In light of that holding, the court of appeals did not reach plaintiffs' federal constitutional claims. The court of appeals also rejected the state's challenge to the trial court's award of attorney fees, citing Lofft v. State Board of Higher Education, 89 Or App

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[7] For purposes of this inquiry, a federal claim is "substantial" unless it is "obviously frivolous" or "absolutely devoid of merit" or clearly foreclosed by prior controlling authority. E.g. Hagans v. Lavine, 415 US 528, 536-38, 94 S. Ct. 1372, 1379 (1974). Plaintiff's federal claims were sufficiently substantial to prevail in the trial court.

614, 750 P2d 515 (1988).[8] The court of appeals awarded additional fees of $8,063 under §1988 for work done before it.

The state petitioned for review in the Oregon Supreme Court.[9] The Oregon Supreme Court affirmed the court of appeals on the merits, holding that the state political action statute violated Article I, Section 8 of the Oregon Constitution. Like the court of appeals, the supreme court there-

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[8] In Lofft, the Oregon Court of Appeals had held, citing Maher v. Gagne, 448 US 122, 133, 100 S. Ct. 2570 (1980), that a plaintiff who prevails on a state claim is entitled to attorney fees under 42 USC §1988 where the court does not reach his concurrent §1983 claim which is substantial and which arises out of a common nucleus of operative fact with the state law claim. 89 Or App at 617, 750 P2d at 517.

[9] The state relied on its argument on the merits for the proposition that no attorney fees should have been awarded, since plaintiffs should not have been "prevailing parties". The state also argued that plaintiffs' federal claims were not substantial.

fore declined to address plaintiffs' federal claim. However, the supreme court overruled the Lofft decision and held that it was unnecessary for plaintiffs to invoke 42 USC §1983 and §1988 because plaintiffs' claims for relief had been so obviously valid under the state constitution. 308 Or at 538-39.[10] The court therefore held the lower courts had erred as a matter of law in awarding any attorney fees at all to plaintiffs.

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[10] The court also relied on its own decision in a previous habeas corpus case in which a §1983 claim for violation of due process had been held unnecessary and attorney fees under §1988 had been denied as a matter of discretion. Id. at 537-38, quoting Roberts v. Mills, 291 Or 21, 628 P2d 714 (1981). The Oregon Supreme Court in the Roberts decision had recognized that analogous federal authority construing §1988 was contrary to its decision but denied fees stating "we believe our approach to be preferable." 291 Or at 24-25 n.3. The Oregon court below reasoned that, after the 1981 decision in Roberts, the State legislature had chosen not to act. 308 Or at 538 n.8.

Plaintiffs requested reconsideration arguing that the meaning of §1988 was not a matter of state law and that federal law, specifically cases construing §1988, had been ignored. On January 11, 1990, the Oregon Supreme Court denied reconsideration.

REASONS FOR GRANTING THE WRIT

I. The Oregon Supreme Court has misconstrued 42 USC §1983 and §1988, and its decision conflicts with the decisions of this Court, other state courts of last resort and the federal courts of appeals.[11]

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[11] The availability of attorney fees under 42 USC §1988 is a federal question. As this Court has held, the attorney fee provision of §1988 "is part of the §1983 remedy whether the action is brought in federal or state court." Maine v. Thiboutot, 498 US 1, 11, 100 S. Ct. 2502, 2508 (1980). A state court enforcing federal rights must enforce all of those rights and may not frustrate congressional intent with its own policy concerns; the state court must give the parties before it the full benefit of federal law when adjudicating federal rights. Felder v. Casey, 487 US 131, 144,

A. The Oregon Supreme Court's decision below conflicts with the decisions of this Court.

There is no question that plaintiffs properly filed federal constitutional claims under 42 USC §1983 before the state courts in this case[12] nor that they are "prevailing parties" within the meaning of §1988. E.g. Hensley v. Eckerhart, 461 US 424, 103 S. Ct. 1933 (1983). Plaintiffs succeeded in having declared unconstitutional a statute which had for 56 years prohibited all political activity other than voting. They thus obtained all the relief they sought and vindicated their political rights and the rights of others similarly situated.

151, 108 S. Ct. 2302, 2313 (1988).

[12] Martinez v. California, 444 U.S. 277, 283 n.7 100 S. Ct. 553,558 n.7. (1980).

A successful plaintiff is the prevailing party for purposes of an award of attorney fees under §1988 even if the plaintiff's victory is not based on a §1983 claim, provided that the winning claim shares a common nucleus of operative fact with a substantial federal constitutional claim. This principle was established in Maher v. Gagne, 448 US 122, 100 S. Ct. 2570 (1980). In that case, the Supreme Court held, unanimously, that in adopting §1988

> "*** Congress was acting within its enforcement power [under the Fourteenth Amendment] in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to the substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication."

In the footnote to that sentence, this Court discussed the legislative history of the 1976 amendments to §1988 as follows:

"The legislative history makes it clear

that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:

" 'To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *** In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the nonconstitutional claim is dispositive. *** In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *** attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that [federal constitutional] claim, so long as the plaintiff prevails on the nonfee claim arising out of a 'common nucleus of operative fact.'" United Mine Workers v. Gibbs, supra, at 725, [16 L Ed 2d 218, 86 S. Ct. 1130]." Id., 448 US at 132 N.15 100 S.Ct. at 2576 n.15. (citations omitted).

In Maher, the plaintiff had asserted federal statutory and constitutional claims in a federal court action, and had obtained a settlement agreement in which she obtained "substantially all of the relief originally sought in her complaint." Id., 448 US at 127 100 S.Ct. at 2573. This Court held that she was entitled to attorney fees under 42 USC §1988.

In Smith v. Robinson, 468 US 922, 104 S. Ct. 3457 (1984) this Court said:

> As the legislative history illustrates and as this Court has recognized, §1988 is a broad grant of authority to courts to award attorney fees to plaintiffs seeking to vindicate federal constitutional and statutory rights (citing cases) ... Congress did not intend to have that authority extinguished by the fact that the case was settled or resolved on a non-constitutional ground.

468 US at 1006, 104 S. Ct. at 3465 (emphasis added) (plaintiffs prevailed under Education for the Handicapped Act (EHA); attorney fees

denied under §1988 because Congress intended to replace the §1983 remedy with the EHA remedy).

Thus the Oregon decision below conflicts with this Court's decision in Maher and analysis in Robinson.

B. The legislative history of §1988 supports this Court's prior decisions and requires an award of attorney fees in this case.

The central and only question in this case, and the question ignored by the court below, is what Congress intended when it enacted the 1976 amendments to §1988. In addition to the plain language of the statute and in addition to the excerpt this Court quoted in Maher, supra, the legislative history surrounding this enactment repeatedly refers to Congress' intent to allow equal access to the courts to enforce

the federal civil rights acts, to give "effective access to the judicial process" to the "vast majority of the victims of civil rights violations [who] cannot afford legal counsel". H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 9 (1976).[13] If the Oregon Supreme Court's decision below stands, civil rights plaintiffs in Oregon will be deprived of an effective remedy unless they can afford to pay counsel, a result which directly contravenes Congress' intent.

Firmly established principles of judicial decision making require that federal consti-

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[13] See also S. Rep. No. 94-1011 94th Cong. 2d Sess. 6 (1976), 1976 US Code Cong. & Admin. News. 5908-13; remarks of Senators Scott, Mathias, Kennedy, Tunney, 122 Cong. Rec. S 16251-52 (daily ed. September 21, 1976); id. at S 17051 (daily ed. September 29, 1976); remarks of Representatives Kastenmeier, Fish, Holtzman, Jordan, Seiberling, id. at H 12155, 12163-65 (daily ed. October 1, 1976).

tutional grounds be considered only after every avenue of relief has been explored under state law. City of Mesquite v. Alladin's Castle, Inc., 455 US 283, 294-95, 102 S.Ct. 1070, 1077-78 (1982); Siler v. Louisville and Nashville Railroad Company, 213 US 175, 193, 29 S.Ct. 451, 455 (1909). Since resort to state law now means no §1988 fees are available in Oregon state courts, plaintiff's counsel will not be able to take civil rights cases in the future as counsel undertook this one, in return for the court's fee award under §1988. The inescapable result will be that the vast majority of cases such as the present case will not be brought or will be directed to federal court.

The Oregon court now stands alone among the states on this question. See pages 23 - 27, infra. However, should the Oregon

court's view spread to other states, the access of ordinary citizens to state judicial protection of their civil rights will be cut off except in those very few states with fee-shifting statutes of their own.[14] In all other states which adopt the Oregon court's view, civil rights plaintiffs will be left without remedy or forced to seek federal judicial protection unless they can afford to pay counsel. That is precisely the problem which Congress sought to remedy when it amended §1988 in 1976. Maine v. Thiboutot, supra, 448 US N n12, 100 S. Ct. 2508 n 12.

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[14] Alaska Civil Rule 82 (1989) (prevailing party entitled to attorney fees in all civil cases); Mass. Gen. L. Ann. ch. 12, §11-I (1988) (prevailing plaintiffs entitled to attorney fees in cases involving violation of constitutional rights); Utah Code Ann. §78-16-3 (1987) (prevailing plaintiffs entitled to fees in cases involving violation of the Fourth and Fourteenth amendments).

C. The Oregon Supreme Court has construed 42 USC §1988 in a way in conflict with the decisions of the federal courts of appeals.

Every reported federal appellate court decision that has considered the issue has held that the Maher principle applies where the plaintiff has prevailed on a state law claim that was joined to a substantial federal claim:

> "*** When the plaintiff in a civil rights action prevails on a pendent state claim based on a common nucleus of operative fact with a substantial federal claim, fees may be awarded under §1988."

Carreras v. City of Anaheim, 768 F2d 1039, 1050 (9th Cir. 1985) (Ordinance regulating solicitation of donations violated California Constitution; federal constitutional claims not reached; §1988 fees awarded.)

In Seals v. Quarterly County Court, 562 F2d 390 (6th Cir. 1977), the Sixth Circuit Court of Appeals addressed a voting rights

claim which had been brought under §1983 as well as the Voting Rights Act and under state law. The case was resolved under state law. 562 F2d at 392. However, the court held that the §1983 claim did not disappear

> because relief is rendered... on an alternative state law ground. Congress clearly has the power in such circumstances to authorize attorney's fees as a matter of federal law, and it equally clearly has done so.

562 F2d at 394.[15]

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[15] Accord, Seaway Drive-In, Inc., v. Township of Clay, 791 F2d 447, 450-52 (6th Cir. 1986), (Drive-in theater ordinance voided on state statutory grounds; fees awarded on §1983 constitutional claims not reached); Exeter-West Greenwich Regional School v. Pontarelli, 788 F2d 47, 52 (1st Cir. 1986) (§1983 claim dismissed as moot when state court on certification from federal district court, granted plaintiffs relief under state law; §1988 fees awarded); Lund v. Affleck, 587 F2d 75, 76-77 (1st Cir. 1978) (State welfare policy invalidated under Social Security Act; fees awarded on concurrent §1983 claims); McDonald v. Doe, 748 F2d 1055, 1057 (5th Cir. 1984) ("§1988 authorizes awarding fees to plaintiffs who succeed on pendent state law claims that are related to undecided but substantial constitutional claims."); State of New York

The decision below thus conflicts squarely on this federal question with every relevant decision of the federal courts of appeals.

D. The Oregon Supreme Court has construed 42 USC §1988 in a way in conflict with the decisions of all the other state courts of last resort which have addressed the

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v. 11 Cornwell Co., 718 F2d 22, 25 n.3 (2nd Cir. 1983) (en banc) (plaintiff prevails on state law claim, awarded fees on undecided, substantial §1983 claim); Williams v. Thomas, 692 F2d 1032, 1036 (5th Cir. 1982) cert. den sub nom. Dallas County, Texas v. Williams, 462 US 1133, 103 S. Ct. 3115, (1983) (plaintiff prevailed on state tort claim; §1988 fees awarded on undecided §1983 due process claim); Kimbrough v. Arkansas Activities Association, 574 F2d 423, 426-27 (8th Cir. 1978) (plaintiff prevailed on construction of state athletic rule; §1988 fees awarded on undecided civil rights claims). See also Milwe v. Cavuoto, 653 F2d 80, 84 (2nd Cir. 1981) (plaintiff prevails on state tort claims, with nominal damages on §1983 claim; attorney fees awarded, quoting Maher, supra.)

question.

Every applicable state appellate decision plaintiffs have found has held that attorney fees should be awarded under §1988 where, as in the case below, plaintiff asserts both state and federal claims; the federal claim is one for which attorney fees may be awarded; the federal claim is substantial[16] and shares a common nucleus of operative fact with the state claim; plaintiff prevails on the state claim; and the court does not reject the federal claim, that is, either plaintiff wins on both claims or the court does not reach the federal claim.[17]

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[16] See note 7, supra.

[17] Davis v. Everett, 443 So 2d 1232, 1235-36 (Ala 1983) (plaintiff prevails on state constitutional claim for liquor license; equal protection claim under §1983 not reached; fees awarded under §1988); Canterbury Nursing Home v. Alabama State Health Planning and Development Agency, 425 So 2d 1103, 1106 (Ala 1983) (plaintiff prevails on state claim; §1983 claim not

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Cal Rptr 1 (Cal App 1987) (state statutory construction avoids First Amendment §1983 claim; §1988 fees awarded); Gumbhir v. Kansas State Bd. of Pharmacy, 231 Kan 507, 646 P2d 1078, 1086 (1982) (principle of Maher quoted, but fees denied for lack of common nucleus operative fact and federal claims found to lack merit); County Exec., Prince Geo's Co. v. Doe, 300 Md 445, 479 A2d 352, 358 (1984) (plaintiff prevails on state grounds; §1988 fees awarded on §1983 claim not reached); Draper v. Town Clerk of Greenfield, 425 NE2d 333, 339 (Mass 1981) (plaintiff prevails on state statutory interpretation, state and federal constitutional questions avoided; §1988 fees awarded); Bung's Bar & Grille, Inc. v. Florence Tp., 206 NJ Super 432, 502 A2d 1198, 1216-1218 (1985) (plaintiff prevails on state grounds; §1988 fees awarded on §1983 claim not reached); Young v. Toia, 66 A.D. 2d 377, 413 NYS2d 530, 531-32 (1979) (plaintiff prevails on state claim; §1988 fees awarded on federal claim not reached); Johnson v. Blum, 58 NY2d 454, 461 NYS2d 782, 448 NE2d 449 (1983); Doe v. Cuddy, 21 Ohio App 3d 270, 487 NE2d 914, 916-917 (1985) (state welfare regulation void under Ohio statute; §1983 constitutional claims not reached; §1988 fees awarded); Intern. Ass'n of Machinists v. Affleck, 504 A2d 468, 470-71 (RI 1986); City of Fort Gates v. Cathey, 665 SW2d 586 (Tex App (1984) (plaintiff prevails on state claim; federal §1983 claims not reached; §1988 fees awarded).

A different result has been reached where a court rules in favor of a plaintiff's

As the Massachusetts Supreme Court said in Stratos v. Dept. of Public Welfare, 387 Mass. 312, 439 N.E. 2nd 778 (1982):

> Section 1983 provides an independent remedy for violation of rights protected by Federal law. If such a right is at issue, the Section 1983 remedy is available, even if the State has also provided a means of obtaining relief. (citing cases) ... the fee incentive is equally useful and necessary whether the right in question is secured by Federal law alone, or by State law as well. Therefore the fact that a plaintiff claiming relief under Section 1983 could

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state claim and goes on to reject the federal claim on its merits. In such a case, attorney fees under §1988 are properly denied. See, e.g., City of Gary v. Redmond, 489 NE 543 (Ind App 1986); Right to Choose v. Byrne, 91 NJ 28, 450 A2d 925 (1982). That is not the situation here, where the trial court found for plaintiffs on their federal claims, and the Oregon appellate courts expressly declined to rule on the federal claims, one way or the other.

In Spencer v. South Carolina Tax Commission, 281 S.C. 492, 316 SE2d 386 (1984) the South Carolina Supreme Court declined to award fees to a plaintiff who prevailed on the contention that a state tax law violated the federal constitution. This Court, equally divided with Justice Powell not sitting, affirmed. 105 S.Ct. 1859 (1985).

> have obtained relief solely by means of a State remedy - even a "routine" one - does not foreclose a fee award.

439 N.E. 2d at 783, citing Maher v. Gagne, supra, at n.15.

Plaintiffs prevailed in the state trial court on both their state and federal constitutional claims. The Oregon Court of Appeals affirmed under the Oregon constitution, as did the Oregon Supreme Court. That pattern of facts leads unquestionably to an award of attorney fees under §1988 in any federal or state court other than the Oregon Supreme Court. The Oregon Supreme Court is not free under the Supremacy Clause to ignore federal law and to deny plaintiffs their federal rights.

As this Court said in Mondou v. New York, New Haven and Hartford Railroad, 223 US 1, 32 S.Ct. 169 (1912):

> When Congress in the exertion of the power confided to it by the Constitution

> adopted [the statute in question], it spoke for all the people and all the States and thereby established a policy for all. That policy is as much the policy of [the state] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State.

223 US at 57, 32 S.Ct. at 178.

II. The Oregon Supreme Court has decided an important question of federal law which should be settled by this Court.

While this Court's decisions in Maher v. Gagne, supra, and Smith v. Robinson, supra, point clearly toward reversal of the Oregon Supreme Court's decision below, neither Maher nor Smith precisely controls this case on its facts. This Court has yet to decide a case in which plaintiffs claim concurrent violations of federal and state constitutions arising out of common facts, and plaintiffs prevail on state constitutional grounds so that federal constitutional

issues are not reached on the merits. As above, the Court's use of the legislative history in Maher and statements in Smith v. Robinson show that the Court has previously read §1988 in a way which would provide for attorney fees in that situation. There are good reasons for such a holding.

First among these is the co-existence of the clear Congressional policy favoring the judicial vindication of individual civil rights and the long-standing judicial policy of avoiding decision on federal constitutional grounds where possible. Maher v. Gagne, supra, 448 US at 132-33, 100 S.Ct. at 2576-77. If the decision below stands, at least in Oregon, one of those federal policies must give way.

Given that statutes providing fees to prevailing parties are rare in state law[18], all civil rights plaintiffs but those few who are able to pay counsel by the hour will be required to forego state remedies and repair to federal court.[19]

Such a result would be particularly unfortunate in those states, such as Oregon, whose state constitutions provide greater protection for certain civil rights than does the federal constitution. Compare City of Portland v. Tidyman, 306 Or 174, 759 P2d 242 (1988) with Broderick v. Oklahoma, 413 US 601, 93 S. Ct. 2908 (1973).

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[18] See note 14, supra.

[19] Fee questions would then become forum questions as Defendants would argue for abstention so as to get state law decisions and avoid fees under the Oregon rule.

Further, the application of a rule such as that fashioned by the Oregon Supreme Court below must be difficult and uneven. For example, the court below finds plaintiffs' §1983 claims "unnecessary" and implies that, in a more difficult case under the state constitution, a §1983 claim might be proper. It is difficult to speculate how such a line might be drawn between "easy" state claims in which §1983 is "unnecessary" and "difficult" state claims in which, §1983 is "necessary". Of course prudent plaintiffs' counsel should include a §1983 claim whenever there are facts and law to support it.[20]

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[20] The rule also implies that plaintiffs and defendants must trade arguments for purposes of the attorney fee part of the case - plaintiffs arguing that their state claims were in reality weak and defendants arguing that the positions they previously took on the non-fee claims were nearly frivolous.

Where a civil rights case is settled short of judgment, the rule heretofore has been that §1988 fees are available where the §1983 claim was a "catalyst" for relief. E.g. Maher v. Gagne, supra, 448 US at 129, 100 S. Ct. at 2575. Given the Oregon Supreme Court's approach, it would then be necessary for the court to take evidence after settlement and evaluate the merits of the plaintiff's state claim to see whether that claim was sufficiently strong to allow the assertion that the §1983 claim was not a "catalyst" so that §1988 fees could be denied. Of course, no such additional inquiry has yet been undertaken, since no court other than the Oregon Supreme Court has applied such a rule.

The answer to the question posed in this case will have broad effects on the enforcement of civil rights in federal and state

courts, on federal dockets and on the balance between state and federal judicial power. This Court should restore the balance disturbed by the decision below.

CONCLUSION

The writ of certiorari should be granted and the Oregon Supreme Court decision reversed. The case should be remanded for reinstatement of the attorney fee awards below and for an award of fees in the Oregon Supreme Court.

Respectfully submitted,

IMPERATI, BARNETT,
SHERWOOD & COON, P.C.

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APPENDIX TO

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE POLICE OFFICERS ASSOCIATION, INC., an Oregon corporation, and STEPHEN BECK,	)	
Petitioners,	)	
vs.	)	
STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,	)	CA A46148 SC S35924
Respondents.	)	

ORDER DENYING RECONSIDERATION

The Court has considered the petition for reconsideration and ORDERS that it be denied.

DATE: January 11, 1990.

/s/ Edwin J. Peterson
Edwin J. Peterson
Chief Justice

copies:

James S. Coon
Timothy A. Sylwester

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE POLICE OFFICERS ASSOCIATION, INC., an Oregon corporation, and STEPHEN BECK,

Respondents on Review,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Petitioners on Review.

TC A8508-05041; CA A46148; SC S35924

In Banc

On review from the Court of Appeals*

Argued and submitted May 3, 1989.

Timothy A. Sylwester, Assistant Attorney General, Salem, argued the cause for petitioners on review. With him on the petition were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

James S. Coon, Portland argued the cause for respondents on review. With him on the response was Imperati, Barnett, Sherwood & Coon, P.C., Portland.

VAN HOOMISSEN, J.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court holding that the political activity clause of ORS 181.400(2) violates Article I, section 8, of the Oregon Constitution, is affirmed. The judgment of the circuit court awarding plaintiffs attorney fees is reversed.

Linde, J., concurred and filed an opinion.

* Appeal from Multnomah County Circuit Court, Irving M. Steinbock, Judge. 94 Or App 478, 766 P2d 408 (1988).

VAN HOOMISSEN, J.

The primary issue in this case is whether the political activity clause of ORS 181.400(2) violates Article I, section 8, of the Oregon Constitution. It does. A secondary issue is whether plaintiffs are entitled to attorney fees as prevailing parties because they also pled a claim under 42 USC §1983. They are not.

I.

ORS 181.400(2) provides in part:

> "Notwithstanding any other law, no member of the state police shall in any way be active or participate in any political contest of any general or special election, except to cast the ballot of the member of the state police."[1]

Plaintiffs are the Oregon State Police Officers Association (OSPOA), an employe organization representing all state police officers up to the rank of senior trooper, and Stephen Beck, OSPOA's president. They sued the State, the Department of State Police, and the Department's Superintendent (hereafter referred to collectively as

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[1] ORS 181.400 was enacted in 1931 and has remained substantially unchanged since that time. The statute has not been cited in or been the subject of any reported appellate decision. The statute itself does not contain a penalty clause. Nor is there any other statutory provision that specifically authorizes any criminal or civil penalty, forfeiture, sanction, or disciplinary action for a state police officer's violation of ORS 181.400. The only apparent statutory sanction is found in ORS 181.290 (grounds for removal of state police).

"defendants") for declaratory and injunctive relief. They contend that the political activity clause of ORS 181.400(2) violates Article I, section 8, of the Oregon Constitution, which provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

They also contend that the clause violates Article I, section 20, of the Oregon Constitution (privileges or immunities clause), and the First and Fourteenth Amendments to the United States Constitution. See 42 USC § 1983.

After plaintiffs filed their complaint, but before trial, the Superintendent issued "guidelines" purporting to interpret ORS 181.400(2) and to clarify the political activity prohibited by that statute. The

Superintendent issued the guidelines pursuant to ORS 181.280, which provides:

"The superintendent shall

"* * * * *

"(2) Make rules and regulations for the discipline and control of the state police."[2]

The guidelines permit state police officers to campaign for or against nonpartisan candidates; to be candidates for

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[2] The Superintendent asserts that the guidelines are an "internal management directive to establish personnel rules" and thus within a statutory exception to Administrative Procedures Act rulemaking requirements. See ORS 183.310(8)(a)(B). Plaintiffs do not challenge that assertion. Thus, we do not address whether the Superintendent does, in fact, have authority to promulgate guidelines without following Administrative Procedures Act rulemaking requirements, ORS 183.310 to 183.350. Nor do we decide whether, independent of ORS 181.400(2), the Superintendent has authority to impose greater restrictions on state police officers' free speech rights than the legislature imposed on public employes generally in Oregon's "Little Hatch Act," ORS 260.432(2), infra, n 3.

and to hold nonpartisan offices (except trial judge, sheriff, and district attorney); to attend partisan candidates' speeches and similar political meetings; to display bumper stickers on their personal vehicles and law signs at their personal residences; and to make monetary contributions to partisan and nonpartisan candidates. Officers may not be candidates for partisan office; participate in the management of a partisan political party of campaign; campaign for or against partisan candidates, committees, or political parties; or participate actively in any effort organized by or on behalf of a partisan candidate or political party which is intended to solicit votes or contributions for or against a particular partisan candidate. The guidelines also permit broad political activity with regard

to initiative and referendum petitions but require officers to give prior notice to the Superintendent before engaging in any ballot measure campaign activity.

Plaintiffs contend that the Superintendent's guidelines violate the same state and federal constitutional provisions. They also contend that the guidelines deny them equal protection of the law because they are more restrictive of off-the-job political activity than ORS 260.432(2), Oregon's "Little Hatch Act," which applies to public employes generally.[3] Plaintiffs

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[3] ORS 260.432(2) provides:

"No public employe shall solicit any money, influence, service or other thing of value or otherwise promote any political committee or promote or oppose the nomination or election of a candidate, the adoption of a measure or the recall of a public office holder while on the job during working hours. However, this section does not restrict the right of a public employe to express personal political views."

are subject to the provisions of ORS 260.432(2). See ORS 260.432(4). Violation of ORS 260.432 is punishable by a civil penalty. ORS 260.995(1). Plaintiffs do not challenge the constitutionality of those restrictions, and the constitutionality of ORS 260.432(2) is not in issue here. Therefore, the question is whether the political restrictions placed on plaintiffs by the political activity clause of ORS 181.400(2) violate Article I, section 8, insofar as they are in excess of the restrictions imposed on plaintiffs by ORS 260.432(s).

The circuit court held that both the political activity claus of ORS 181.400(2) and the Superintendent's guidelines are unconstitutionally overbroad under the state and federal constitutions and that they deny plaintiffs equal protection of the laws, and

enjoined defendants from enforcing them. The court also awarded plaintiffs attorney fees on their 42 USC §1983 claims.[4]

The Court of Appeals affirmed, holding that ORS 181.400(2) "is facially inconsistent with Article I, section 8," and that no narrowing construction could save the statute. Oregon State Police Assn. v. State of Oregon, 94 Or App 478, 766 P2d 408 (1988). The Court of Appeals did not reach the other state or federal constitutional issues raised by the parties, but it affirmed the trial court's award of attorney

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[4] 42 USC § 1988 provides:

"In any action or proceeding to enforce a provision of * * * [42 USC §] 1983 * * * the court, in its discretion, may allow the prevailing party * * * a reasonable attorney fee as part of the costs."

fees.[5]

II.

Plaintiffs do not argue that ORS 181.400(2) is unconstitutional as a direct prohibition on protected political speech, They argue only that the statute is overbroad. Defendants virtually concede that, standing alone, the statute is overbroad. They argue, however, that the narrowing interpretation of the Superintendent's guidelines brings the political activity clause within constitutional bounds, and that the appropriate inquiry is whether the statute is constitutional as interpreted and implemented by the guidelines.

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[5] The Court of Appeals relied on Lofft v. State Board of Higher Ed., 89 Or App 614, 750 P2d 515 (1988). No petition for review was filed in Lofft, and, therefore we had no occasion to review the Court of Appeals' 42 USC § 1988 analysis in that case.

We first examine plaintiff's overbreadth claim under the Oregon Constitution. See Sterling v. Cupp, 290 Or 611, 614, 625 P2d 123 (1981). The state asserts that ORS 181.400(2) aims at maintaining a nonpolitical police force. Statutes directed at an effect of speech may be constitutional, unless the statute is overbroad. See, e.g., In re Lasswell, 296 Or 121, 673 P3d 855 (1983); State v. Robertson, 293 Or 402, 649 P2d 569 (1982); cf. Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298 (1986), appeal dismissed 480 US 942 (1987).

Political speech is an essential form of expression protected by Article I, section 8. See Ivancie v. Thornton, 250 Or 550, 553, 443 P2d 612 (1968), cert den 393 US 1018 (1969); Minielli v. State, 242 Or 490,

499, 411 P2d 69 (1966).[6] In prohibiting any political activity or speech except voting,ORS 181.400(2) imposes restrictions that go far beyond any permissible limitation that the state may place on state police officers' Article I, section 8, rights. The statute impermissibly prohibits state police officers from engaging in any manner in the political election process. Nothing in the record demonstrates that the promotion of the efficiency, integrity, and discipline of the state police requires the

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[6] In Deras v. Myers, 272 Or 47, 62,535 P2d 541 (1975), in holding that a statute limiting campaign expenditures violates Article I, section 8, of the Oregon Constitution, we stated:

> "[The law] closes or impedes important channels of communication on public issues and thus denies citizens freedom of expression where the protection of that constitutional right is the most necessary to preserve our system of government."

prohibition contained in ORS 181.400(2). See Minielly v. State, supra, 242 Or at 498-99. To paraphrase City of Hillsboro v. Purcell, 306 Or 547, 556, 761 P2d 510 (1988), the state may yet choose to regulate rather than totally proscribe the political activity of state police officers. The state has not yet done so.

III.

Ordinarily, an agency can interpret a statute so as to exclude unconstitutional applications before the agency is forced to question the statute's validity. Cooper v. Eugene Sch. Dist. No. 4J, supra, 301 Or at 365. Similarly, we will not construe a statute to violate constitutional prohibitions unless no other construction is possible. Roberts v. Mills, 290 Or 441, 447, 622 P2d 1094 (1981); State v. Smyth, 286 Or 293, 296, 593 P2d 1166 (1979). Here,

no limiting regulation could be both consistent with the express prohibition of ORS 181.400(2) against any political activity except voting and at the same time narrow the statute's scope within constitutional limits. ORS 181.400(2) cannot be saved by judicial or agency interpretation. We hold that the political activity clause of ORS 181.4000(2) is overbroad in violation of Article I, section 8, of the Oregon Constitution.

Because we hold that the clause violates Article I, section 8, we need not determine plaintiffs' claims under Article I, section 20, of the Oregon Constitution or under the First and Fourteenth Amendments. See Suess Builders v. City of Beaverton, 294 Or 254, 267, 656 P2d 306 (1982); Deras v. Myers, 272 Or 47, 53, 535 P2d 541 (1975).

IV.

We consider plaintiffs' parallel federal claims only to the extent necessary to resolve defendants' contention that the circuit court erred in awarding plaintiffs attorney fees under 42 USC § 1988.

We previously considered this issue in Roberts v. Mills, 291 Or 21, 628 P2d 714 (1981). In that case, Roberts sought his release from custody under both state habeas corpus law and 42 USC § 1983. He prevailed.[7] When he later petitioned for attorney fees pursuant to 42 USC § 1988, this court denied his petition:

> "A primary purpose of [42 USC] § 1983 is to provide a remedy for violation of a person's civil rights where state remedies are inadequate. * * * Insofar as this case is concerned, the state

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[7] Roberts' habeas corpus petition was based on both the state and federal constitutions. This court's decision, Roberts v. Mills, 290 Or 441, 622 P2d 1094 (1981), does not indicate whether Roberts' claim was sustained on state or federal constitutional grounds or both.

remedy was procedurally and substantively adequate, and the federal enactment of § 1983 filled no void. The bare reference to § 1983 in the habeas corpus petition was proper, but it turned out to be superfluous. The invocation of § 1983 simply had no effect whatever upon the decision of the case or the relief granted.

"* * * * *

"The purpose of 42 USC § 1988 is to ensure that private citizens have a meaningful opportunity to vindicate the important congressional policies contained in the Civil Rights Act. Here, where an adequate state procedure exists for vindication of the juvenile's right to be free from illegal restraint, we decline to award attorney fees under § 1988." 291 Or at 24.[8] (Citations and

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[8] We recognize that nonavailability of attorney fees for state claims may cause plaintiffs to disfavor state claims when they have federal claims for which fees are available. Indeed, Justice Lent's arguments in dissent in Roberts are not without merit. As Justice Brennan pointed out in Maine v. Thiboutot, 448 US 1, 11 n 12, 100 S Ct 2502, 65 L Ed 2d 555 (1980), "if fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal court." However, after our decision in Roberts, 291 Or 21, those considerations are now in the hands of the

footnote omitted).

In Sterling v. Cupp, supra, 290 Or at 614, we explained that the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law. See also Suess Builders v. City of Beaverton, supra, 294 Or 267; Deras v. Myers, supra, 272 Or at 53. In this case, state remedies are adequate to protect plaintiffs' rights. Therefore, the state did not deny them any federal constitutional rights. Because plaintiffs were entitled to relief based upon an interpretation and application of the Oregon Constitution, their invocation of 42 USC § 1983 was unnecessary to the decision or the relief granted. We hold

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legislature, which has not chosen to act in this area. See Friesen, Recovering Damages for State Bills of Rights Claims, 63 Tex L Rev 1269, 1303-10 (1985).

that the circuit court erred in awarding plaintiffs 42 USC § 1988 attorney fees.

There may be cases in which protection of a claimed right under Oregon statutory or constitutional law is in doubt, for instance, because lower court or responsible state agencies have previously rejected the claim, so that reliance on a federal constitutional guarantee reasonably can be said to be necessary. But this court's modern decisions under Article I, section 8, should leave no basis to believe that a citizen of Oregon must invoke the federal constitution to protect rights to free political speech and participation.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the circuit court holding that the political activity clause of ORS 181.400(2) violates Article I, section 8,

of the Oregon Constitution, is affirmed. The judgment of the circuit court awarding plaintiffs attorney fees is reversed.

LINDE, J., concurring.

It soon will be 100 years since Judge Oliver Wendell Holmes for the Supreme Judicial Court of Massachusetts, wrote of a predecessor of today's plaintiffs: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. New Bedford, 155 Mass 216, 220, 29 NE 517 (1892). The epigram was facile; McAuliffe did not claim a constitutional right to be a policeman but a right not to be disqualified or dismissed from that position because he exercised the political rights of a citizen. This court long has recognized that citizens cannot be forced to sacrifice all political rights simply because they accept public employment. Minielly v. State, 242 Or 490, 411 P2d 69 (1966) (invalidating requirement that civil

service employees resign when becoming a candidate for elective office).

The court therefore correctly decides that ORS 181.400(2) is unconstitutional under Article I, section 8 (and, I believe, under other Oregon constitutional provisions for the political rights of citizenship), insofar as it purports to deny state police officers all participation in political activities beyond voting. It is less obvious whether the statute is flatly invalid on its face because it is textually directed against political speech and writing rather than some feared effect of political activity by police officers, or whether the statute is overbroad because it so far exceeds any permissible regulation of those activities that a court cannot save it.

ORS 181.40092), which states no penalty,

presumably is not a penal law. Analysis therefore begins with the question whether there are some activities that lawmakers could not forbid citizens generally but that they may declare to be incompatible with the role and work of police officers. Examples are In re Lasswell, 296 Or 121, 673 P2d 855 (1983), which held that a professional rule directed to prosecutors could validly restrict their comments on a pending case if it was narrowly limited to situations when a prosecutor intends or "knows or is bound to know that the statements pose a serious and imminent threat to the [factfinding] process," 296 Or at 126, and in Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298 (1986), appeal dismissed 480 US 942 (1987), which held that a statute could validly restrict public school teachers' rights under Article I, sections

2 and 3, if the statute was limited to "circumstances when a teacher's dressing in accordance with the standards of this or her religion is truly incompatible with the school's commitment to maintaining for its students [an] atmosphere of religious freedom and neutrality," 301 Or at 380.

It is important to note that lawmakers may not simply attach the sacrifice of constitutional rights to public employment. The constitutional test is found not in an analogy between public employers and private employers but between the government as regulator and as manager. The relevant source is not the employment relationship but the incompatibility of otherwise privileged conduct with performance in one's role or function; for instance, the application of the disciplinary rule in In re Lasswell would apply to a lawyer retained

as a city attorney or ad hoc prosecutor as well as to a regularly employed prosecutor.[1] In judging government constraints on the "incompatible" exercise of constitutional privileges, it is immaterial whether a librarian, a driver, a nurse, or a security guard is employed in the private or in the public sector, unless (as with religious displays by public school teachers) the very fact of one's public role and function makes conduct incompatible that would not be incompatible with the same role or function in a private capacity.

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[1] Another example might be the position of drug counselors like those in Smith v. Employment Division, 307 Or 68, 763 P2d 146 (1988), cert granted ___ US ___, 109 S Ct 1526 (1989), whose religious use of peyote government authorities might find incompatible with that role equally in private or in public employment. See also Humphers v. First Interstate Bank, 298 Or 706, 696 P2d 527 (1985) (medical services act limits licensed physician's freedom to disclose confidential patient information).

The proper test, therefore, is whether the state could require anyone engaged in similar work, private or public, to refrain from otherwise privileged activities; and if not, whether the particular restriction is justified by the specific public role of police officers. That is a difficult question. Perhaps the strongest arguments for insisting on a nonpolitical, at least a nonpartisan, police force may be drawn from the experience of countries where such forces (as well as other armed forces) have been instruments of the regime in power against its political opponents and where the authority of a regime sometimes rests on the political assent of these forces. Forestalling the abuse or perceived abuse of police power for political ends may justify some narrowly designed limitation on police officers' political activities.

But such arguments must in the first instance be assessed by lawmakers; it is not for courts to invent such reasons in reviewing a law. See Cooper v. Eugene Sch. Dist. No. 4J, supra, 301 Or at 373. The law must specify expressly or by clear inference what "serious and imminent" effects it is designed to prevent. See In re Lasswell, supra, 296 Or at 126.

This court has wrestled with the problem closer to home, in phrasing the constraints of the Oregon Code of Judicial Conduct on political activities of judges. Thus, Canon 7 does not forbid "political activity" as such (defined in the canon as including to speak publicly, to raise or give funds, or to lend one's name to a political purpose or a political organization), but only when the activity produces one of four stated effects that the drafters considered

incompatible with judicial office. One of these is that the activity "jeopardizes the confidence of the public or of government officials in the political impartiality of the judicial branch of government."[2] The effect therefore has to be assessed at the time of the political activity; it is not simply assumed at the time of enactment.

This approach, followed in Lasswell and in Cooper, may not be the final word on disqualification from a position or assignment on grounds of incompatible activities that otherwise are constitutionally privileged. It may, however, aid toward the analysis of

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[2] Canon 7(a)(4). Canon 7(B)(4) also forbids judges or candidates for judgeships to "make pledges or promises of conduct in office other than the faithful, impartial and diligent performance of the office," presumably on the premise that a judge must remain free to reach decisions on the merits untrammeled by prior campaign commitments.

proposals put forward to prevent identifiable adverse effects of political activities.

I concur in the court's opinion.

APPENDIX C

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

OREGON STATE POLICE OFFICERS
ASSOCIATION, INC., ET AL,
Respondents - Cross-Appellants,

v.

STATE OF OREGON et al,
Appellants - Cross-Respondents.

(A8508-05041; CA A46148)

Appeal from Circuit Court, Multnomah County.

Irving M. Steinbock, Judge

Argued and submitted November 18, 1988.

Timothy A. Sylwester, Assistant Attorney General, Salem, argued the cause for appellants - cross-respondents. With him on the briefs were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

James A. Coon, Portland, argued the cause for respondents - cross-appellants. With him on the briefs was Imperati, Barnett, Sherwood & Coon, P.C., Portland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

RICHARDSON, P.J.

Affirmed on appeal and on cross-appeal.

RICHARDSON, P.J.

Plaintiffs are the Oregon State Police Officers Association and Stephen Beck, its president. The association is the bargaining representative for non-supervisory police officers employed by defendant Department of State Police. Plaintiffs brought this action for declaratory and injunctive relief against the state, the department and Brandaw, its superintendent, contending that ORS 181.400(2) violates Article I, sections 8 and 20, of the state constitution, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The challenged statute provides, as material, that

> "no member of the state police shall in any way be active or participate in any political contest of any general or special election, except to cast the ballot of the member of the state police."

Approximately a year and a half after the action was commenced, and approximately two months before it was tried, the superintendent issued guidelines purporting to define what political activities ORS 181.400(2) permits state police officers to undertake. Although the guidelines are substantially less restricted than the statute,[1] they permit less off-the-job political activity by state police officers than ORS 260.432 allows by other public employes. After the guidelines were promulgated, plaintiffs amended the complaint to challenge their constitutionality as well as the statute.

The trial court ruled in plaintiffs' favor on three of their eight claims,

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[1] The trial court noted that the guidelines are inconsistent with the statute. That question is not directly before us in this case.

holding that the statute and guidelines are overbroad, and therefore violate Article I, section 8, and the First Amendment, and that they deny equal protection to plaintiffs and the association's members by imposing greater limitations on their political activity than the restrictions which apply to other public employes and, in particular, other law enforcement officers. The trial court also awarded attorney fees to plaintiffs pursuant to 42 USC §1988 in connection with their federal claims. Defendants appeal, and plaintiffs cross-appeal. We affirm.

Defendants argue first that the action does not present a justiciable controversy:

> "No officer in the Oregon State Police is being disciplined, or is in threat of discipline, for having engaged in political activity. Plaintiffs' suit is thus a constitutional attack on the face of ORS 181.400(2)

and the implementing regulations, and does not involve a complaint as to the constitutionality of the application of the statute and regulations to any past conduct by any officer. Because the statute is not self-executing and the superintendent's disciplinary guidelines have specifically interpreted the statute to proscribe only a few well-defined types of political activity, there is a present justiciable controversy, if at all, only as to the constitutionality of the current guidelines and not as to the face of the statute. Moreover, because no officer has been or is being disciplined for violating the guidelines, there is not specific threat by defendants that any particular officer will be disciplined if he engages in any particular contemplated conduct, and there is an adequate administrative procedure available to challenge the validity of the guidelines in the event any officer is ever disciplined for violat[ing] the guidelines[.] [T]here is not present justiciable controversy as to the constitutionality of the guidelines. Plaintiffs cannot state a justiciable controversy warranting judicial intervention to address and resolve the constitutionality of the statute and the implementing guidelines unless and until the superintendent applies or threatens to apply them to particular conduct by an officer."

The focus of the argument is

miscast. The controversy which plaintiffs present has little if anything to do with discipline or the risk of discipline. Their contention is that they and the association's members wish to engage in enumerated activities which, they assert, the statute and the guidelines prohibit them from doing. Stated otherwise, plaintiffs seek a determination of the meaning or validity of a statute which affects their rights by its very terms. See ORS 28.020. It is difficult to visualize a controversy which comes more squarely within the statutes governing declaratory relief than this one. See Brown v. Oregon State Bar, 293 Or 446, 648 P2d 1289 (1982).

The difficulty with defendants' argument goes beyond the justiciability issue and extends to the merits. Defendants presuppose that the superintendent's

guidelines can have some vitality, independent of the statute, even if the statute itself is invalid. The superintendent has the authority, inter alia, to "[m]ake rules and regulations for the discipline and control of the state police." ORS 181.280(2). However, even assuming that that authority could include an independent regulation of political activity, the guidelines here do not purport to be that. They state their purpose:

> "Because the limitations imposed by [ORS 181.400(2)] might not be self-explanatory, the Department of State Police adopts the following guidelines to govern the interpretation and administration of ORS 181.400(2)."

The superintendent's promulgation is simply an interpretation of the statute. Although that interpretation arguably could serve as, or could assist us in devising, a narrowing construction by which the

statute could survive plaintiffs' Article I, section 8, and First Amendment overbreadth challenges, we conclude that no narrowing construction is possible. That statute unambiguously provides that the franchise is the only political right which state police officers may exercise.

Plaintiffs do not argue that the statute violates Article I, section 8, as an impermissible regulation of speech or its content. They argue, rather, that ORS 181.400(2) is overbroad, because its restrictions on political expression exceed the "compelling governmental interest" that justifies any regulation. We agree generally with plaintiffs. The court said in Cooper v. Eugene Sch. Dist. No. 4J, 301 Or 358, 723 P2d 298 (1986), appeal dismissed _____ US _____ (94 L Ed 2d 784) (1987):

> "[W]e have held that expression that could not constitutionally be

> prohibited outright may nevertheless be found incompatible with the performance of an official professional role. In Burt v. Blumenauer, 299 Or 55, 74, 699 P2d 168 (1985), we recognized that public advocacy of a vote for or against a disputed ballot measure, normally the essence of individual free speech, may under narrowly defined circumstances be incompatible with an individual's public duties. In re Lasswell, 296 Or 121, 673 P2d 855 (1983), held that a disciplinary rule prohibiting a prosecutor's extrajudicial comments on a pending trial is not an unconstitutional infringement of free speech if it is narrowly limited to actual incompatibility between the speech and the prosecutor's official function." 301 Or at 377-78. (Footnote omitted.)

See also In Re Richmond, 285 Or 469, 591 P2d 728 (1979); see also Koch v. City of Portland, 94 Or App 484, _____ P2d ____ (1988).

ORS 181.400(2) is not narrowly limited in the way that Cooper and the cases that it cites require. Its restrictions are virtually plenary. We hold that the

challenged part of the statute is facially inconsistent with Article I, section 8. In the light of that holding, we do not reach the other state or federal constitutional issues raised by the appeal or the cross-appeal.

Defendants also assign error to the award of attorney fees under 42 USC § 1988. We reject the assignment. See Lofft v. State Board of Higher Ed., 89 Or App 614, 750 P2d 515 (1988).

Affirmed on appeal and on cross-appeal.

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

OREGON STATE POLICE OFFICERS ASSOCIATION, INC., an Oregon corporation and STEPHEN BECK,	)
Plaintiffs,	)
v.	)
STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,	)
Defendants.	)

Case No. A8508-05041

JUDGMENT ORDER

This case was tried to the Court July 31, August 3 and August 4, 1987, and the Court having considered the testimony, exhibits and written and oral arguments of the parties,

JUDGMENT IS HEREBY GIVEN in favor of plaintiffs on their First, Second and Eighth claims for relief and for defendants on

plaintiffs' Third, Fourth , Fifth, Sixth and Seventh claims for relief. The first sentence of ORS 181.400(2) and defendants' May 11, 1987 "Department Policy with Respect to Members Engaging in Political Activities under ORS 181.400" are hereby declared unconstitutionally over-broad and deny plaintiffs equal protection of the laws, and defendants are hereby enjoined from enforcing them.

Plaintiffs are prevailing parties. Plaintiffs' request for attorney fees under ORS 182.090(1) is denied. Plaintiffs' request for attorney fees under 42 U.S.C. §1988 is granted in the amount of $25,470.00.

Costs are awarded to plaintiffs in the amount of $1,439.00.

Dated this 22 day of September, 1987,

/s/ Irving M. Steinbock
Hon. Irving M. Steinbock

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, STEPHEN BECK,

Plaintiffs,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Defendants.

CERTIFICATE OF FILING

I, James S. Coon, being first duly sworn, depose and say that I am one of attorneys for petitioner herein. That I filed the above PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF THE STATE OF OREGON with the Clerk of the Supreme Court of the United States on the _____ day of April, 1990, that it was placed in an envelope properly addressed with prepaid postage thereon and deposited in the United States Post Office at Portland, Oregon.

James S. Coon

SUBSCRIBED and SWORN to before me this ____ day of April, 1990.

NOTARY PUBLIC FOR OREGON
My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON on:

Solicitor General
Department of Justice
Washington, DC 20530

Timothy A. Sylwester
Assistant Attorney General
Department of Justice
Justice Building
Salem, OR 97310

this _____ day of April, 1990, by mailing to each three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes addressed to said individuals at their regular office addresses; said sealed envelopes were then deposited in the United States post office at Portland, Oregon on the day last above mentioned with the postage thereon fully paid.

_____
James S. Coon
Attorney for Claimant

89-1604 (2)

Supreme Court, U.S.
FILED
JUN 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

James S. Coon
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IMPERATI, BARNETT, SHERWOOD
& COON, P.C.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

Petitioner submits this supplemental brief under Supreme Court Rule 15.7 to bring to the Court's attention a further order of the Oregon Supreme Court below.

Petitioners append hereto the order of the Oregon Supreme Court dated May 16, 1990

denying petitioners attorney fees for services rendered in the Oregon Supreme Court in this matter.

Petitioners request that the Court review and reverse this May 16, 1990 decision of the Oregon Supreme Court as well as the January 11, 1990 Order Denying Reconsideration and November 30, 1989 Decision of the Oregon Supreme Court.

The legal questions raised by the Oregon Court's May 16 order are identical to those addressed in the Petition for Certiorari, and petitioners have no further argument at this time.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Oregon Supreme Court's decisions reversed. The case should be remanded for reinstatement of the

attorney fee awards made by the Oregon Circuit Court and Court of Appeals and for an award of attorney fees in the Oregon Supreme Court.

Respectfully submitted,

IMPERATI, BARNETT,
SHERWOOD & COON, P.C.

James S. Coon
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APPENDIX TO

Supplemental Brief on Petition for Writ of Certiorari to the Supreme Court for the State of Oregon

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE POLICE OFFICERS ASSOCIATION, INC., an Oregon corporation, and STEPHEN BECK, Plaintiffs Respondents Cross-Appellants-Respondents on Review, vs. STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police, Defendants-Appellants Cross-Respondents-Petitioners on Review,	MCCC#A8508 05041 CA A46148 SC S35924

ORDER DENYING PETITION FOR ATTORNEY FEES

Respondents on review have petitioned for an award of attorney fees for services rendered in the court and petitioners on review have filed an objection.

IT IS ORDERED that the petition is denied.

DATED this 16 day of May, 1990.

Edwin Peterson
Chief Justice

c: James S. Coon
Timothy Sylwester

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON on

Solicitor General
Department of Justice
Washington, DC 20530

Telephone (202) 514-2000

Virginia L. Linder
Assistant Attorney General
Department of Justice
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Salem, OR 97310

Telephone (503) 378-4402

this _____ day of June, 1990, by mailing to each three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes addressed to said individuals at their regular office addresses; said sealed envelopes were then deposited in the United States post office at Portland, Oregon on the day last above mentioned with the postage thereon fully paid.

All parties required to be served have been served.

_____
James S. Coon
Attorney for Petitioners

No. 89-1604

Supreme Court, U.S.
FILED
JUL 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF OREGON

RESPONDENTS' BRIEF IN OPPOSITION

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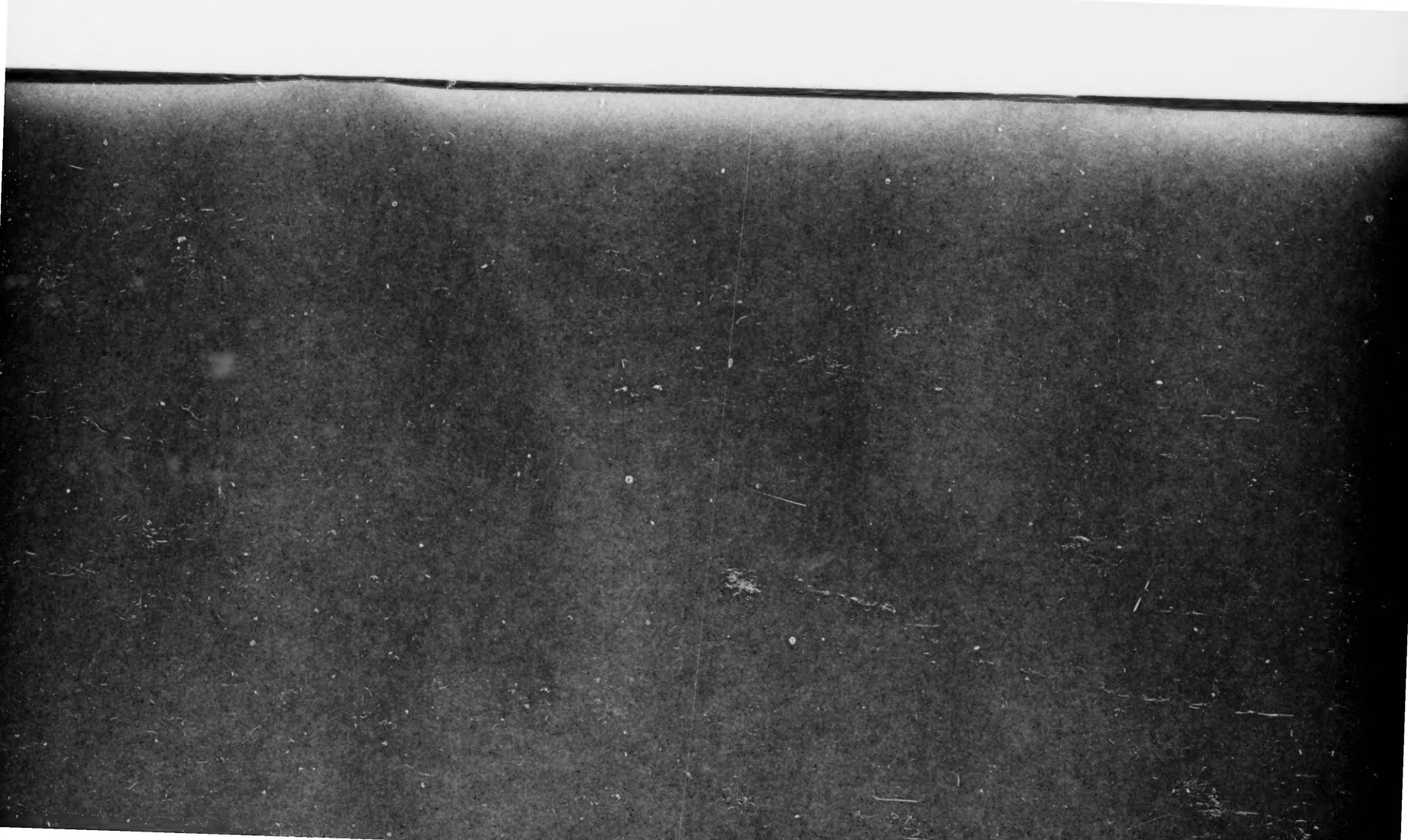

QUESTION PRESENTED

Are plaintiffs "prevailing parties" for purposes of awarding attorney fees under 42 U.S.C. § 1988 when the state supreme court affirms the judgment for plaintiffs on their state claim but holds that their federal rights were *not* violated because state law adequately protected plaintiffs' rights?

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

There is some doubt about the Court's jurisdiction to review the case at this stage. Petitioners' jurisdictional statement is not adequate to identify that concern, so respondents offer the following to supplement the petition.

Under 28 U.S.C. § 2101(e) (1988), the Court has jurisdiction to review final "judgments" of the state courts in civil cases. Oregon's procedures for issuing appellate judgments are somewhat novel and, indeed, have created uncertainty for the Court and for Oregon litigants on prior occasions.[1] Under Oregon practice, the appellate judgment issues after the date of the decision, and the decision is not effective until that time. Or. R. App. P. 14.05(2). The judgment consists of the appellate court decision together with a final order and seal of the court; it issues only after expiration of all relevant periods for seeking further review or reconsideration and for filing motions for attorney fees. Or. R. App. P. 14.05(3). The Oregon appellate rules also contemplate a stay of issuance of the appellate judgment pending action on the case by the

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[1] *E.g., Alaska Airlines, Inc. and USAir, Inc. v. Dept. of Revenue, State of Oregon*, (No. 89-346)(Special letter from Court staff asking petitioners to identify effective date of judgment. Response, with accompanying documentation from Oregon appellate court clerk's office, explained that the date of appellate judgment was not the same as the decision date, but instead was controlled by the date on which the document denominated "appellate judgment" was issued by the State Court Administrator. Following response, Court ruled on petition for writ of certiorari filed six months after decision date, but within 90 days of appellate judgment); *State v. Wagner, et al.*, (No. 89-1867)(Protective motion for extension of time to file petition to ensure that time for filing petition would run from date of appellate judgment, rather than date of appellate decision. Motion described in detail Oregon practices for issuing appellate judgments and took the position that under Oregon practice, issuance of appellate judgment, rather than decision date, controls time for filing the petition).

United States Supreme Court. Or. R. App. P. 14.10. Thus, under Oregon practice, there is no appellate judgment until some indefinite time after the date of decision. Anomalously, in some instances no appellate judgment issues at all, in anticipation of review by this Court.

In this case, no final appellate judgment has issued or become effective. The Oregon Supreme Court announced its decision on November 30, 1989. Pet. Cert. App. B. Petitioners thereafter timely filed a petition for reconsideration, which the Oregon Supreme Court denied on January 11, 1990. Pet. Cert. App. A. Within 90 days of the denial of the petition for reconsideration, petitioners filed their petition for writ of certiorari. *See* 28 U.S.C. § 1257(a) (1988). On April 23, 1990, the Oregon Supreme Court received this Court's notification that a petition for writ of certiorari had been filed in this case. The Oregon Supreme Court has declined to take any further action pending disposition of the petition.

The lack of an appellate judgment in this case at most renders the petition premature. Whether the state court's failure to issue an effective judgment interferes with the Court's jurisdiction, at least under the circumstances presented by this case, is less than clear. When the Oregon Supreme Court denied petitioners' petition for reconsideration, the adjudication by the state's highest court was all but complete. All that remained was for the State Court Administrator to issue the "appellate judgment." That act has not been performed, not because there are other events to transpire before the state court's resolution of the case is final, but apparently only because the state court is awaiting this Court's disposition of the petition for certiorari. Of course, whether the absence of a document which the state court denominates a judgment interferes with the Court's jurisdiction is a matter for the Court itself to determine. *See Cole v.*

Violette, 319 U.S. 581, 582 (1943). Respondents would agree in this case, at least in light of the order denying reconsideration, that the Oregon courts have fully adjudicated the rights in question and that no further meaningful state court review is available. *See ibid*; *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942). Also, respondents claim no prejudice from the Court's consideration of the petition at this juncture.

REASONS TO DENY CERTIORARI

I. Petitioners' Question Presented is not presented by this case.

Petitioners and respondents disagree less on the proper construction of 42 U.S.C. § 1988 (1982) than on the nature of the decision which petitioners ask this Court to reverse. In their Question Presented and throughout their petition, petitioners assert that the Oregon Supreme Court failed to reach their federal claim. They argue that, because they obtained relief on their claim under the Oregon Constitution, they are prevailing parties and entitled to attorney fees under 42 U.S.C. § 1988, as construed in *Maher v. Gagne*, 448 U.S. 122 (1980), even though they did not prevail on their federal claim. Petitioners assume that this case is virtually indistinguishable from *Maher*, and they describe the Oregon court as a minority of one in its refusal to award them attorney fees for the allegedly unresolved federal claim.

There are at least two fundamental flaws with petitioners' approach. First, the Oregon Supreme Court clearly *did* decide petitioners' federal claim, albeit only for purposes of resolving their attorney fee claim, and concluded that "the state did not deny them any federal constitutional rights." *Oregon State Police Assn. v. State of Oregon*, 308 Or. 531, 538, 783 P.2d 7 (1989). Second, even if petitioners' characterization of the Oregon court's decision were correct, they gloss over substantial differences between this case and *Maher v. Gagne*, *supra*,

and they ignore aspects of their federal claim which cast considerable doubt on its substantiality. Thus, the issues which this case could present are markedly different from the issue petitioners argue. Moreover, this case is not a good one to resolve even those questions which petitioners could, but do not, present to this Court.

A. The Oregon Supreme Court reached and resolved the federal claim.

Petitioners' entire argument turns on their assumption that the Oregon court failed to reach their claim under the first amendment to the United States Constitution. *See, e.g.*, Pet. Cert. at pp. i, 13, 24 and 24-26 n.17. Because plaintiffs unquestionably prevailed on their state law claim, they assert that this Court's analysis of 42 U.S.C. § 1988 in *Maher, supra*, and *Smith v. Robinson*, 468 U.S. 992 (1984), renders petitioners prevailing parties for purposes of section 1988.

Petitioners' argument starts from a false premise. The Oregon Supreme Court did not hold merely that it was unnecessary to reach petitioners' federal claim because they prevailed on their state constitutional claim. Instead, the court expressly stated that it would consider petitioners' federal claim "to the extent necessary to resolve" the attorney fee issue, *Oregon State Police Assn. v. State of Oregon*, 308 Or. at 537, and it proceeded to decide the merits of that claim:

> [T]he state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law. . . . In this case, state remedies are adequate to protect plaintiffs' rights. *Therefore, the state did not deny them any federal constitutional rights.*

Id. at 538 (citations omitted, emphasis added). The Oregon Supreme Court's clear statement that the state did not deny petitioners any federal constitutional rights is squarely at odds with petitioners' assertions that the Oregon court failed to reach their federal claim, and it removes the foundation for

petitioners' claim that they were prevailing parties under section 1988.

The difference between the Oregon court's decision and petitioners' characterization of it is not a mere slip of the court's pen. Nor is the Oregon court's holding simply another way of saying that it declined to reach petitioners' federal claim. The theory that the state does not violate federal rights when state law affords relief on a claim arising from the same operative facts is well established in Oregon jurisprudence. In *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), the Oregon Supreme Court stated:

> The proper sequence is to analyze the state's law, including its constitutional law, before reaching a federal constitutional claim. This is required, not for the sake either of parochialism or of style, but because the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law.

Id. at 614, *quoted with approval in Massachusetts v. Upton*, 466 U.S. 727, 736 (1984) (Stevens, J., concurring in the judgment). *See also Suess Builders v. City of Beaverton*, 294 Or. 254, 267, 656 P.2d 306 (1982); *Hewitt v. SAIF*, 294 Or. 33, 42, 653 P.2d 970 (1982); *Roberts v. Mills*, 290 Or. 441, 447, 622 P.2d 1094 (1981).[2] In light of the Oregon court's repeated assertion of this theory, it is impossible to read its opinion in this case as declining to reach the merits of petitioners' first amendment claim.

Because petitioners have mischaracterized the nature of the Oregon court's decision, this case does not present the

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[2] *See also* Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 179 (1984); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980). (The author of the law review articles was, at the time, an associate justice of the Oregon Supreme Court).

issue which petitioners ask this Court to resolve. Contrary to petitioners' assertion, the Oregon court actually decided the merits of petitioners' federal claim and rejected it; *Maher v. Gagne*, *supra*, and the line of cases applying its reasoning therefore are simply inapposite.[3] To prevail on their section 1988 claim, petitioners would have to show that the Oregon court erroneously evaluated the merits of their federal claim. That showing would lead immediately to a discussion of constitutional theories about relationships between state and federal courts and the interaction between state and federal grounds of decisions. Those constitutional issues are far removed from the section 1988 question which petitioners purport to address.

B. Petitioners are not prevailing parties for purposes of section 1988.

Respondents acknowledge that section 1988, as construed by this Court, binds the state courts. *Felder v. Casey*, 487 U.S. 131 (1988); *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). This Court has stated the general rule governing section 1988 claims in federal court: "when the claim upon which a plaintiff actually prevails is accompanied by a 'substantial,' though undecided, § 1983 claim arising from the same nucleus of facts, a fee award is appropriate." *Smith v. Robinson*, 468 U.S. at 1002; *see also Maher v. Gagne*, 448 U.S. at 132-33. By

---

[3] The petition assumes that petitioners' federal claim was sufficiently "substantial" under *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974), to make them prevailing parties under the *Maher* rationale. There is a significant question, however, whether the *Hagans* substantiality test should apply to federal claims filed in state court. *See Jackson v. Inhabitants of Town of Searsport*, 456 A.2d 852, n.13 (Me. 1983) (*Hagens* standard is merely a threshold test of federal court's Article III power to hear case. Grafting the *Hagens* standard on to the retrospective inquiry of whether a party has prevailed for purposes of section 1988 has scant support in logic. The argument that the *Hagans* standard is appropriate because federal courts are familiar with it has no justification at all when a state court hears pendent federal claims).

authorizing a fee award for an unaddressed constitutional claim, Congress intended "to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive." *Smith*, 468 U.S. at 1007. That rationale has no application, of course, if the court reaches the constitutional claim and decides it adversely to plaintiff. And even where the court declines to reach the constitutional question, fees should not be awarded if the fee-generating claim has nothing to do with plaintiff's success. *Smith*, 468 U.S. at 1009 n.2.

As plaintiffs acknowledge, where a court rules in favor of a plaintiff's state law claim and goes on to reject the federal claim on its merits, plaintiff is not a prevailing party and is not entitled to attorney fees under section 1988. Pet. Cert. pp. 25-26 n.17. That is precisely what happened in this case. Respondents have found no decision holding that a plaintiff who prevails on a state law claim but loses on the federal claim is nonetheless a prevailing party for purposes of section 1988. The Fifth Circuit has clearly articulated the distinction:

> A party who prevails on both state and appropriate federal claims is a "prevailing party" within the meaning of § 1988. Furthermore, a party who wins only a pendent state claim may be a "prevailing party" under § 1988 if the court has avoided a substantial constitutional claim in the case. . . . But a party who wins pendent state claims while *losing* all federal claims is not entitled to fees. *McDonald v. Doe*, 748 F.2d 1055, 1057 & n. 13 (5th Cir. 1984) (circuits are unanimous on this issue). In the case before us, the federal courts have not avoided a substantial constitutional claim; both the district court and our Court have held that the plaintiffs' federal claims are moot. Therefore, the plaintiffs can "prevail" in this case only if they prevailed on their federal claim.

Heath v. Brown, 807 F.2d 1229, 1233 (5th Cir. 1987) (citations omitted, emphasis in original) (vacating attorney fee award and remanding for factual determination of causality).[4] As the Third Circuit stated in *Luria Bros. & Co. v. Allen*, 672 F.2d 347, 357 (3d Cir. 1982): "The statute [section 1988] plainly limits fee awards to 'the prevailing party' '[in] any action or proceeding to enforce a provision of [section] 1983.' The losing party is not the prevailing party; what is black cannot be called white."

While acknowledging that the Supremacy Clause requires state courts to award attorney fees to plaintiffs who are prevailing parties under section 1988, the state courts are understandably reluctant to award fees where state law does not authorize it and section 1988 does not require it.[5] State appellate courts therefore have frequently decided the merits of the federal claim even when state law was otherwise dispositive.[6] As the Maine Supreme Court explained in a

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[4] *See also Raley v. Fraser*, 747 F.2d 287 (5th Cir. 1984); *Reel v. Arkansas Department of Correction*, 672 F.2d 693, 698 (8th Cir. 1982); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *Russo v. State of N.Y.*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

[5] In this case, state law provided two avenues to obtain attorney fees. Or. Rev. Stat. § 182.090 authorizes courts to award attorney fees to a prevailing petitioner if the court finds that "the state agency acted without a reasonable basis in fact or law." Petitioners sought, but did not obtain, fees under this standard. In exceptional cases, the Oregon courts also award fees when a plaintiff succeeds in vindicating rights of special public importance. *Deras v. Myers*, 272 Or. 47, 66, 535 P.2d 541 (1975). Petitioners did not seek fees on that basis.

[6] *See, e.g., Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 151 Ariz. 134, 726 P.2d 231 (1986) (to determine whether trial court properly awarded attorney fees pursuant to section 1988, appellate court first decides whether trial court correctly found violation of constitutional rights); *Misuraca v. Perales*, 120 A.D.2d 592, 501 N.Y.S.2d 907 (1986) (case settled on state law claims; attorney fee award reversed, because constitutional claim wholly without merit); *City of Gary v. Redmond*, 489 N.E.2d 543 (Ind. App. 1986) (trial court awarded relief without specifying grounds; on defendant's appeal for attorney fee award, appellate court reviewed merits of federal due process claim; attorney fee award reversed); *Right to Choose v. Byrne*, 91 N.J. 287,

(Footnote continued on next page)

thoughtful opinion in *Jackson v. Inhabitants of the Town of Searsport*, 456 A.2d 852, 856 (Me. 1983):

> To allow attorney's fees under section 1988 to parties who assert meritless federal claims along with valid state claims would in many cases effectively abrogate the American Rule. Any person with a claim founded in state law against a state or its subdivisions would have every incentive to interject a section 1983 claim into the action regardless of its validity. We will not so easily infer as drastic an intrusion by Congress into the internal functionings of judicial systems of the several states. . . . If a federal claim under the civil rights laws has no merit, it cannot serve as the predicate for the imposition of attorney's fees simply because it is appended to a valid state claim. We must, therefore, decide if the Plaintiff in the case at bar had a meritorious claim under section 1983.

See also Spencer v. South Carolina Tax Com'n, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided court* 471 U.S. 82 (1985) (attorney fees denied because "it may reasonably be inferred that the sole reason for alleging section 1983 was to justify the allowance of counsel fees").

The Oregon Supreme Court's decision in this case thus accords with numerous decisions holding that, when the court reaches the federal claim and decides it adversely to plaintiffs, plaintiffs are not prevailing parties under section 1988, despite a victory on a state law claim. Petitioners here have not argued that the Oregon court erred by reaching their federal claim, and respondents have found no case holding

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450 A.2d 925 (1982) ("section 1988 permits an award of counsel fees to a party who prevails on a state claim only when the federal claims are adjudicated favorably for that party or not adjudicated at all;" reversing trial court's rulings both on merits of federal claim and on attorney fees.)

that it is error to decide the federal claim on its merits in order to adjudicate the request for attorney fees.[7]

C. The theory underlying the Oregon court's decision is not sufficiently developed for this Court's review.

Because the Oregon court properly reached the merits of the federal claim in order to resolve petitioners' claim for attorney fees, petitioners can prevail only if they establish that the Oregon court decided it incorrectly. In other words, they would have to show, contrary to the Oregon court's decision, that the state violated their federal constitutional rights. Petitioners have not even begun to make that argument in this Court.

The Oregon court's analytical approach— deciding state law claims before turning to federal constitutional questions—is not in itself controversial.[8] In some cases, however, the Oregon court has gone beyond merely choosing to rest its decision on an independent state ground. It has extended the analytical approach to encompass a substantive decision that the state does not violate federally protected rights when state law affords relief. The Oregon Supreme Court's theory that "the state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law," *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981), might present substantial and interesting questions in a proper case. For several reasons, however, this is not the proper case to explore the broad issues underlying the Oregon court's theory.

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[7] Indeed, the legislative history of section 1988 implies that a court may properly reach the constitutional question if it so chooses. *See Maher v. Gagne*, *supra*, 448 U.S. at 132 n.15.

[8] Although it may sometimes be difficult to determine whether the state court decision indeed rests upon an adequate independent state ground, *see, e.g., Michigan v. Long*, 463 U.S. 1032 (1983), the analytical approach itself is widely accepted and well respected. *See generally, Delaware v. VanArsdall*, 475 U.S. 673, 701 n.10, 702 n.11, 704-05 (1986) (Stevens, J., dissenting) (discussing cases and authorities); *State v. Caraher*, 293 Or. 741, 751, 653 P.2d 942 (1982) (citing cases).

First, the petition for certiorari does not even identify the issue presented by the Oregon court's rationale, much less begin to analyze whether the Oregon court's disposition of their federal claim is correct. Second, other states have followed Oregon's lead in deciding state constitutional issues before reaching the federal ones. *See* note 6, *supra*. Respondents are aware of no other state, however, which has yet extended the analytical method to hold that the state remedy answers the federal claim as a matter of substance. If other states adopt a similar approach, their decisions will assist in defining the theory's jurisprudential moorings.

Third, and perhaps most important, although the Oregon court has repeatedly referred to the principle that state remedies may negate a federal claim, the dimensions of the doctrine are not yet clear, even in Oregon. Frequently, the court relies upon its theory simply to explain why it is unnecessary to reach the federal claim.[9] Except for this case, only rarely has the Oregon court's invocation of the "state law first" principle had any practical effect on the outcome of the case. It is not yet clear how the Oregon court will apply its theory to various types of federal claims. For instance, the theory appears unexceptionable when applied to many due process claims. *Cf. Suess Builders, Inc. v. City of Beaverton*, *supra*, (inverse condemnation claim). *See also Jackson v. Inhabitants of Town of Searsport*, *supra*, 456 A.2d at 856-60 (rejecting due process claim because state remedies were adequate, citing *Parratt v. Taylor*, 451 U.S. 527 (1981)); *City of Gary v. Redmond*, *supra*, 489 N.E.2d at 548-50 (state's post-

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[9] *E.g.*, *State v. Spencer*, 289 Or. 225, 611 P.2d 1147 (1980). *See also State ex rel. Juvenile Department v. Geist*, 310 Or. ____, ____, ____ P.2d ____ (July 17, 1990) (because state law provides mother in termination of parental rights proceeding with right to adequate counsel and a procedure to vindicate that right, court "need not address" due process claim); *Deras v. Myers*, 272 Or. 47, 53, 535 P.2d 541 (1975); *Dickman v. School Dist. No. 62C*, 232 Or. 238, 245-46, 366 P.2d 533 (1961).

deprivation procedures comported with due process). But its application may be more problematical where a state official has already acted in a manner claimed to infringe upon constitutional rights; for instance, if the state has distributed free textbooks and teachers to parochial schools, state law may provide a remedy, but it does not "undo" the unconstitutional act itself.[10] Here, however, petitioners challenged a statute which the Oregon courts had not construed, which had never been enforced, which defendants did not threaten to enforce, and which was patently invalid under the Oregon Constitution. Under these circumstances, the Oregon court soundly concluded that the "state"—*i.e.*, state law taken as a whole—did not deprive petitioners of any federally protected rights. Whether that analysis comports with federal law may present a close question, but the question will be easier to resolve once the Oregon court has more clearly delineated the contours of its doctrine. In this case, the parties did not brief the issue in the way the Oregon court decided it; the Oregon court provided only a cursory explanation of its rationale; and the petitioners have failed to grapple in their petition with the state court's actual ground for decision. If the consequences of the Oregon court's decision are as far-reaching as petitioners imply, litigants in Oregon undoubtedly will join arguments on the issue in a manner that will prompt the Oregon court to elucidate its theory sufficiently for the parties and this Court to assess better its full import.

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[10] *But see* Linde, *Without "Due Process"*, 49 OR. L. REV. 125, 134-35 (1970). Linde argues that the principle applies even as to completed conduct, by virtue of the logical relationship between the state and federal constitutions. The federal bill of rights binds the states through the due process and equal protection clauses of the fourteenth amendment. Whether the state has violated the fourteenth amendment's commands depends on what final action the state has taken. The state constitution is part of the state's law, and decisions applying it are part of the "total state action in a case." *Id.* at 133. Necessarily, a state does not violate the fourteenth amendment when the state court sets aside official action under its own constitution. *Ibid.*

II. Procedurally and Factually, This Case Is a Poor Vehicle for Review of the Issue Presented by the Petition.

Because petitioners misunderstand the state court's ground for decision, they make several assumptions about the federal claim that cannot stand given the present posture of the case. Petitioners assume that the federal question was "substantial" and otherwise properly before the state court; they assume that there are no circumstances which would justify a denial of attorney fees; and they assume that, had the Oregon Supreme Court not resolved the case on the ground that it did, the state court would have declined to adjudicate the federal claim altogether. In fact, however, were this Court to accept review, it is likely that the Court at most would vacate the judgment and return it to the Oregon Supreme Court for resolution of the many remaining questions about the federal claim.

A. The federal claim was not justiciable.

The state defendants maintained throughout this litigation that the federal claim did not raise a justiciable controversy. Given the basis for its decision, the Oregon Supreme Court did not resolve that question. The challenge to the justiciability of the federal claim, however, was well-founded.

The gravamen of petitioners' complaint sought a declaratory ruling striking down Or. Rev. Stat. § 181.400(2), which places limits on political campaign activities by police officers. The logical defendant for the action was the state itself. For purposes of the federal section 1983 claim, however, the state could not be sued. *Will v. Michigan Dept. of State Police*, ___ U.S. ___, 109 S.Ct. 2304, 2308-11 (1989) (a state is not a "person" within the meaning of section 1983).[11] Petitioners' complaint avoided this problem by suing

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[11] The state was named as a defendant for the state declaratory judgment action, and thus is a defendant in the caption of the case.

defendant Brandaw (the State Police Superintendent) in both his official and individual capacity. *Id.* at 2311 n.10 (state official may be sued in official capacity for injunctive relief). Defendant Brandaw, however, had never attempted or threatened to enforce the statute, either before or during the lawsuit.

Indeed, there has been no known or threatened enforcement of the statute throughout its existence in Oregon. Enacted in 1931, the law in question is relatively old and has remained substantially unchanged since then.[12] Despite its long existence, it has not been cited in, much less been the subject of, any known enforcement action or appellate decision. The statute does not even contain a penalty clause, and no Oregon statute specifically authorizes a criminal or civil penalty, forfeiture, or any sanction or disciplinary action for a state police officer's political activities.[13]

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[12] The statute, presently codified at Or. Rev. Stat. § 181.400, was originally enacted by Oregon Laws 1931, chapter 139, § 19, and was formerly codified at Oregon Code § 67-2619 and O.C.L.A. § 91720. The only pertinent amendment to the statute since its enactment was to substitute "state police" for "department" and to add the phrase "Notwithstanding any other law" to subsection (2). 1971 Or. Laws ch. 267, § 25.

[13] The only apparent sanction arises by implication through Or. Rev. Stat. § 181.290, which permits the Superintendent of State Police to "remove" a police officer for, *inter alia*, "misfeasance, malfeasance, nonfeasance in office, . . . wilful violation of any rule or regulation of the department, [or] insubordination . . . ." For that purpose, Or. Rev. Stat. § 181.280(2) authorizes the Superintendent to "[m]ake rules and regulations for the discipline and control of the state police," and Or. Rev. Stat. §§ 181.290 to 181.350 provide a required procedure governing discipline or removal of an officer.

The Superintendent for the first time promulgated rules governing political participation only after this lawsuit was filed, in what all parties would have to acknowledge was an attempt to narrow the statute so that it would be enforced, if at all, only in ways consistent with settled federal constitutional parameters. The rules drastically narrowed the statute's provisions so as to permit off-duty participation in nonpartisan political campaigns. The rules restricted only partisan campaign activities other than contributing money, expressing an opinion or attending political meetings as a member of the audience. The limitations placed on on-duty political activity were essentially the same as those that fall within Oregon's "little

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Given this posture, justiciability of petitioners' federal claim is substantially in doubt, if not plainly lacking. In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), this Court refused to resolve a broad attack on the Hatch Act's constitutionality where the record failed to disclose a "threat of interference by the [Civil Service] Commission with rights of these appellants . . . beyond that implied by the existence of the law and the regulations." *Id.* at 91. Reasoning that any interference with first amendment interests was speculative and hypothetical at best, the Court rejected as nonjusticiable the claims of all but one plaintiff. *Id.* at 89-90.[14] The only

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Hatch Act," which also governed plaintiffs as state employees and which plaintiffs did not challenge. Although plaintiffs maintained their first amendment challenge to the Superintendent's narrowing rule, which is the only possible basis to assert some threatened enforcement of the statute itself, they could not cite even a single case in support of that challenge. Their omission was not surprising; federal law upholding even more onerous restrictions on government employees is well-settled. *E.g., Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding Oklahoma restrictions on partisan activity by state employees); *U.S. Civil Service Comm. v. Natl. Asso. of Letter Carriers*, 413 U.S. 548 (1973) (upholding Hatch Act provisions restricting federal employees from taking active part in political campaigns or their management); *Clements v. Fashing*, 457 U.S. 957 (1982) (upholding state authority to restrict political activity participation); *Wachsman v. City of Dallas*, 704 F.2d 160 *reh. in banc denied* 710 F.2d 837 (5th Cir.), *cert. denied* 464 U.S. 1012 (1983) (upholding restrictions on nonpartisan activities by police officers and firefighters).

[14] The Court reasoned:

> The power of courts, and ultimately of this Court, to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication. It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, between the freedom of the individual and the requirements of public order except when definite rights appear upon the one side and definite prejudicial interferences upon the other.

Id. at 89-90 (footnote omitted).

plaintiff who presented justiciable claim had been charged with violating the Act and threatened with removal from office. *Id.* at 91-92. Since *Mitchell*, the Court has adhered to the requirement that there be an active controversy and real threat to constitutional interests before courts will adjudicate government employees' political participation rights. *See, e.g., U.S. Civil Service Comm. v. Natl. Asso. of Letter Carriers*, 413 U.S. at 554-56 (reaffirming *Mitchell*, but finding a justiciable controversy because plaintiffs alleged both that they had engaged in prohibited activity and that the commission "was enforcing, or threatening to enforce, the Hatch Act's prohibition").[15]

Because the court would lack jurisdiction over the federal claim if it is not justiciable, the justiciability dispute would have to be settled before an award of attorney fees would even arguably be due under 42 U.S.C. § 1988. *Cf. Maher v. Gagne*, 448 U.S. at 132-33 (federal court has authority to award attorney fees under section 1988 for nonconstitutional federal claim if the federal claim is sufficiently "substantial" to support the court's jurisdiction). A significant question going to jurisdiction thus remains unresolved, and it is unlikely that the Court would reach the question petitioners want answered. The most petitioners could hope for would be a remand to the Oregon Supreme Court to decide the justiciability issue. Alternatively, because justiciability is a question of law, this Court might find itself resolving the case on that ground and affirming the Oregon Supreme Court's judgment without ever reaching the question the petition seeks to present.

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[15] *See also Broadrick v. Oklahoma*, 413 U.S. at 609 (plaintiffs had been charged with and faced dismissal for violating state's "little Hatch Act"); *Clements v. Fashing*, 457 U.S. at 961-62 (sufficient case or controversy where plaintiffs alleged that they would engage in activities but for the prohibitions *and* provisions at issue either purported to effect an automatic forfeiture of office or automatically precluded them from seeking another office).

B. Even if the Oregon Supreme Court's rationale is flawed, there are several reasons why attorney fees nevertheless should be denied in this case.

The fact that the action here was purely declaratory in nature—that is, for nearly 60 years the statute had not been enforced and there was no threat of enforcement—plagues petitioners' entitlement to section 1988 attorney fees in other ways. It casts serious doubt on the "substantiality" of the federal claim for purely declaratory and injunctive relief, and it gives the lower court ample grounds for a discretionary denial of fees.

1. Petitioners, beginning with their Question Presented and continuing through the argument in their petition, take as a given that their federal claim was properly brought and was "substantial." However, to obtain purely declaratory and injunctive relief against a state official in a section 1983 action, there must be some real threat of an on-going violation of a plaintiff's federal interests. *Green v. Mansour*, 474 U.S. 64, 73-74 (1985). Of course in this case, the challenged statute had not been enforced since its enactment, and there was no sudden interest in enforcing it. Petitioners therefore could not meet even a threshold test for declaratory and injunctive relief under section 1983, and their claim properly would have been dismissed. *Cf. J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1476-78 (10th Cir. 1985) (fees properly denied to partially successful plaintiff where alleged constitutional violation, had it gone to trial, would not have been cognizable in section 1983 action).

2. The purely declaratory nature of this lawsuit, coupled with the aging and unenforced statute that petitioners made their target, would support a discretionary refusal to award

attorney fees under section 1988.[16] Petitioners perhaps achieved a moral victory in state court, but their lawsuit resulted in no real benefit other than to have defendant Brandaw enjoined from action he had never attempted to take and had shown no likelihood of taking.[17] Even assuming petitioners could overcome the justiciability problems inherent in their suit and could meet the requirements of *Green v. Mansour*, *supra*, the state court would be justified in declining to award attorney fees for a lawsuit directed against a statute that had lain dormant for over half a century.[18]

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[16] Lower courts generally recognize the strong congressional policy underlying section 1988 of encouraging private attorneys general to enforce fundamental constitutional rights under section 1983. *See generally, e.g., Riddell v. National Democratic Party*, 624 F.2d 539, 543-47 n.9 (5th Cir. 1980) (discussing standards for attorney fees awards and caselaw); *Society of Professional Journalists v. Briggs*, 687 F.Supp. 1521, 1523-24 (D. Utah 1988) (discussing cases). However, the lower courts have also observed that Congress expressly declined to make such awards mandatory, leaving courts the discretion to decline awards under circumstances where they would not further the interests to be vindicated by a section 1983 action. *E.g., Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1370 (N.D. N.Y. 1977). "Special circumstances" to deny fees are found generally in cases in which the benefit of the lawsuit is particularly narrow, private, or academic. *See Riddell v. National Democratic Party*, *supra*.

[17] *See Chastang v. Flynn & Emirch Co.*, 541 F.2d 1040, 1045 (1976) (citing as factor in fee denial that defendants had little control over contested discriminatory aspects of retirement plan). *See generally, Society of Prof. Journalists v. Briggs*, 687 F.Supp. 1521, 1524 n.13 (D. Utah 1988) (discussing cases denying attorney fees where defendant was powerless to provide remedy sought).

[18] *Naprstek v. City of Norwich*, 433 F.Supp. 1369, 1370-71 (N.D. N.Y. 1977) (no award of attorney fees for declaratory and injunctive relief against law that was antiquated and rarely enforced; no constitutional rights were seriously threatened and no significant public benefit was achieved). *Accord, Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978); *Kreutzer v. County of San Diego*, 153 Cal.App.3d 62, 200 Cal. Rptr. 322 (1984). The federal district court in *Naprstek v. City of Norwich*, was troubled at the prospect of encouraging federal rights lawsuits that served only a "housecleaning" purpose by clearing state and local codes of outdated statutes that were not likely to be enforced.

> [W]e will not encourage a wholesale scramble by lawyers to challenge possibly thousands of ancient and ineffectual municipal ordinances, on the expectation that counsel fees must be awarded automatically.

433 F.Supp. at 1371.

The Oregon Supreme Court's rationale points strongly in the direction of an additional basis on which the court could have, and likely would have, declined to award fees—*e.g.*, the federal claim was unnecessary to the relief obtained. Petitioners' suit was, in its purest sense, little more than a state declaratory judgment proceeding. State courts frequently find themselves confronted with state law actions dressed up as section 1983 claims, or to which a section 1983 claim is unnecessarily attached, merely as a way to generate attorney fees. State courts properly should have the latitude to deny fees where the federal claim was, in the state court's judgment, wholly unnecessary to the relief awarded. *See Spencer v. South Carolina*, *supra*, 316 S.E.2d at 388-89; *Moran v. Pima County*, 145 Ariz. 183, 700 P.2d 881, 882-83 (1985); *see generally* Friesen, *Recovering Damages for State Bills of Rights Claim*, 63 TEX. L. REV. 1269, 1303-10 (1985). The view that petitioners' claim was wholly unnecessary to this lawsuit was implicit in the Oregon Supreme Court's holding. If this Court is unsure whether the Oregon court would deny fees on that basis, the case properly should be remanded to the state court for a more express determination whether the federal claim was surplusage that served no real purpose except to generate fees.

C. At most, a grant of review would result in a remand to state court so that it may decide whether to adjudicate the federal claim.

Petitioners' entire position begins with the false premise that the Oregon Supreme Court completely failed to reach their federal claim after resolving their state claim favorably. More accurately, and as discussed previously at length, the Oregon Supreme Court resolved the federal claim on the merits by concluding that there could be no federal constitutional violation where the state constitution addressed and satisfied petitioners' concerns.

If the Oregon Supreme Court's rationale were to be invalidated, the case should then be remanded to the state court to determine whether it chooses to decline to reach the federal claim altogether, or whether it wishes to adjudicate it fully. The state defendants maintained throughout this litigation that the federal claim was without merit and that the only real question was whether the challenged statute and regulations could withstand the much more protective provisions of the Oregon Constitution. The state defendants also urged that the Oregon Supreme Court should decide the scope of the first amendment's protections in this context, since the state defendants' only exposure to attorney fees was pursuant to petitioners' federal claim.

It may be that, if the Oregon court had known it could not resolve the attorney fees on the basis that it did, it would decline to reach the federal claim for the same jurisprudential reasons that cause the federal courts to avoid constitutional issues when possible. But whether the state court would opt for jurisprudential economy here is a question for the state court in the first and final instance. The Oregon court might appropriately be concerned at the prospect of forcing the state defendants to bear an award of attorney fees on the basis of an unresolved claim which they had steadfastly maintained should fail. That prospect is particularly troubling when an award of attorney fees for the state claim offends state legal policy, but federal law mandates a fee award if the federal claim is not reached. Indeed, state courts often resolve federal claims, despite adequate and independent state grounds for decision, in order to have some confidence that section 1988 attorney fees fairly should be borne by a defendant. *See* discussion *supra* at pp. 8-9 and n.6. The Oregon Supreme Court would be entitled to the opportunity to fully adjudicate the federal claim, where, as here, it did not decline to engage it, but instead choose to do so and found that no federal claim remained to be resolved.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

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No. 89-1604

In The

Supreme Court of the United States

October Term, 1990

OREGON STATE POLICE OFFICERS ASSOCIATION, an Oregon corporation, and STEPHEN BECK,

Petitioners,

v.

STATE OF OREGON, OREGON DEPARTMENT OF STATE POLICE, and EMIL BRANDAW, Superintendent of State Police,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court For The State Of Oregon

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

JURISDICTION

Respondents raise the question of jurisdiction because the Petition for Certiorari was filed within ninety days after the Oregon Supreme Court's final decision on reconsideration but before the Oregon court issued its mandate or "appellate judgment". The Oregon court issued its final decision on reconsideration January 11, 1990; petitioners filed for certiorari April 11, 1990; the Oregon court issued is "appellate judgment" August 8, 1990. ORAP 14.05(2). The Oregon decision below is now unquestionably final.

ARGUMENT

I. PETITIONERS HAVE ACCURATELY DESCRIBED THE QUESTION PRESENTED IN THIS CASE.

Respondents seek to escape review in this case by contending that petitioners have misconstrued the Oregon Supreme Court's decision and have therefore failed properly to phrase the "question presented". First, respondents' interpretation of the Oregon decision is strained and inaccurate. Second, the question whether petitioners are prevailing parties under 42 U.S.C. Section 1988 is fairly presented in this case however one construes the Oregon court's decision.

A. Respondents' reconstruction of the Oregon court's decision is inaccurate.

This case presents the question whether plaintiffs are prevailing parties under 42 U.S.C. Section 1988 where they

prevail on a state constitutional claim and the court therefore fails to reach and decide on its merits a substantial federal constitutional claim arising out of the same nucleus of operative fact. Respondents contend that question is not presented here because the Oregon court did not "fail to reach" plaintiffs' federal claim but rather held that the federal claim was without merit because plaintiffs prevailed on their state claim.[1] In making this argument, respondents ignore most of the Oregon court's reasoning.

The fact is that the Oregon court's decision draws no distinction among the following statements:

> (1) Where plaintiffs prevail on a state claim, the court "need not determine" plaintiffs' federal claims, *OSPOA v. State of Oregon*, 308 Or. 531, 537, 783 P.2d 7, 10 (1989);
>
> (2) Where plaintiffs prevail on state claims, their federal claims are "unecessary". *Id.* at 538-39, 738 P.2d at 11; and
>
> (3) Where plaintiffs prevail on a state claim, the state has denied them no federal rights. *Id.*

The Oregon court uses each of these formulations in explaining its decision to deny plaintiffs their federal statutory right to attorney fees. First, at the end of Section III of its Opinion, the Oregon court says:

> "Because we hold that ORS 181.400(2) violates Article I, Section 8 [of the Oregon Constitution], we need not determine plaintiffs' claims under Article I, Section 20, of the Oregon Constitution

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[1] Respondents' contention that plaintiffs' federal claims are not justiciable is surprising in light of their argument that the Oregon Supreme Court decided those claims on the merits. The Oregon court must raise the issue of justiciability *sua sponte* where necessary. *Oregon Medical Ass'n v. Rawls*, 281 Or. 292, 574 P.2d 1103 (1978). It did not in this case.

> or under the First and Fourteenth Amendments."

308 Or. at 537, 783 P.2d at 10.

Having decided not to reach plaintiffs' federal claims on their merits but only to consider them for purposes of deciding the attorney fee issue, the Oregon court then relies on *Roberts v. Mills*, 291 Or. 21, 628 P.2d 714 (1981), an habeas corpus case in which it held that the reliance on 42 U.S.C. Section 1983 for relief "turned out to be superfluous" because the habeas corpus petitioner had an adequate state remedy. The Oregon court then goes on to hold below that, because plaintiffs had a state remedy, the state denied them no federal rights:

> In this case, state remedies are adequate to protect plaintiffs' rights. Therefore, the state did not deny them any federal constitutional rights. Because plaintiffs were entitled to relief based upon an interpretation and application of the Oregon Constitution, *their invocation of 42 U.S.C. Section 1983 was unnecessary to the decision or the relief granted.*

308 Or. at 538, 783 P.2d at 11 (emphasis added). The Oregon court obviously draws no distinction between the idea that no federal right is denied where a state remedy is provided and the idea that reliance on federal law is unnecessary where state claims provide relief.[2]

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[2] The Oregon Court of Appeals seems to think the supreme court meant state claim success makes a federal claim "unnecessary". *Saylor v. State Water Resources Dep't.*, 100 Or. App. 745, 787 P.2d 494 (per curiam), *rev. den.* 310 Or. 122, ___ P.2d ___ (1990). The Supreme Court's denial of review belies the state's contention that the court will "further develop" its rationale for denying civil rights attorney fees. *See* Respondents' Opposition at 10-12.

Finally, the Oregon court explains that reliance on federal remedies may be considered "necessary" where the state right is not so clear:

> There may be cases in which protection of a claimed right under the Oregon statutory or constitutional law is in doubt, for instance, because lower court or responsible state agencies have previously rejected the claim, so that reliance on a federal constitutional guarantee reasonably can be said to be necessary. But this court's modern decisions under Article I, Section 8 [of the Oregon constitution], should leave no basis to believe that a citizen of Oregon must invoke the federal constitution to protect rights to free political speech and participation.

308 Or. at 538-39, 783 P.2d at 11. This language squarely contradicts the respondents' argument that the court has held plaintiffs' federal claims were without merit because plaintiffs prevailed on their state claims. If respondents were right it would make no difference whether the plaintiffs' right to state relief was entirely obvious or very much in doubt – whenever plaintiffs prevailed under state law, their federal claims would automatically be found to be without merit. No fair reading of the Oregon court's decision in this case can so construe it.

Plaintiffs' federal claims were not defeated in this case; they were found "unnecessary," and the courts did not reach their merits. The Oregon court's reasoning ignores the intent of Congress and the holdings of this Court, all of the federal appellate decisions which have considered the issue, and the vast majority of decisions of state courts of last resort. Respondents fail to address any of these authorities.

B. Petitioners' Question Presented fairly includes all the arguments respondents raise.

This Court's Rules provide:

> The statement of any question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition, or fairly included therein, will be considered by the Court.

Supreme Court Rule 14.1.(a). Even if respondents had correctly construed the Oregon court's decision below, the question presented would not change. The question is whether plaintiffs are "prevailing parties" under 42 U.S.C. Section 1988. Plaintiffs are prevailing parties because they had a substantial, but undecided federal claim which arose out of the same nucleus of operative facts as did the state claim on which they prevailed. Respondents argue plaintiffs are not prevailing parties because, though they agree plaintiffs prevailed on a state claim and that their federal claim arose out of the same nucleus of operative facts, they contend plaintiffs' federal claim was found to be meritless. Respondents also argue plaintiffs' federal claim was not "substantial". It is hardly unusual for the parties to disagree as to procedural facts or as to the phrasing of an issue. That does not make the question presented a different question. Nor does it remove the issue in this case from the realm of those fairly included in the question plaintiffs have presented.

Plaintiffs' Question Presented is exactly the question presented in this case. Respondents' focus on avoiding the question rather than on responding to it should not hamper this Court's review.

II. THE STATE DID DENY PLAINTIFFS' FEDERAL RIGHTS.

The state statute ultimately declared unconstitutional in this case had, since 1931, denied every member of the Oregon State Police all political rights other than voting. Former ORS 181.400(2).[3] The uncontradicted testimony at trial was that several state troopers had decided not to undertake various forms of political activity and that the plaintiff State Police Association had declined to print political material in its newspaper or to support any political candidate because of the statute Tr[4] 13, 15, 17, 22-26, 101-02. The chilling effect of the statute, especially on police officers sworn to uphold the law, cannot seriously be questioned.

When plaintiffs decided in 1985 to challenge the statute, they consulted with respondents concerning possible legislative modification or other means not involving litigation by which the issue could be handled. The State Attorney General took the position that the statute was entirely constitutional.[5] Respondents, through the State Attorney General's Office argued that the statute was constitutional under the state and federal constitutions through appeals to the Oregon Court of Appeals and the

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[3] Respondents' attempt to trivialize this by citing *Naprstek v. City of Norwich*, 433 F.Supp. 1369 (NDNY 1977) (teenage curfew ordinance) should fail. This case restored fundamental rights of citizenship to 650 Oregon Troopers and 300 management personnel.

[4] "Tr" refers to the transcript of the trial below.

[5] Plaintiff's Petition for Award of Attorney Fees (in trial court), Affidavit of Counsel at 2.

Oregon Supreme Court.[6] It is only in this Court that the state finally acknowledges the statute was "patently invalid" under the Oregon Constitution. Respondents' Brief in Opposition at 12. Until the Oregon Supreme Court's decision, no responsible attorney could have advised plaintiff State Police Association or any of its members to engage in political activity in violation of ORS 181.400(2) – that is, in any political activity at all. Until the Oregon Supreme Court rendered its decision, the state indeed denied plaintiffs their right to engage in political activity. There is no dispute that that is a right protected by the First Amendment to the United States Constitution.

The State's argument that the state denies no federal rights as long as the ultimate result of state court litigation favors plaintiffs on state grounds is based on an argument made by recently retired Oregon Supreme

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[6] Respondent's statement that they have "maintained throughout this litigation" a position that the state constitutional provision presented the only serious question is simply false. At the trial court level and in the Oregon Court of Appeals, the state argued that the federal and state constitutions provided identical protections for plaintiffs' rights:

> "at least, the court has not interpreted the state constitution different from or more expansive than federal decisions that have interpreted the First Amendment in like circumstances."

State's Brief in Oregon Court of Appeals at 30. In the Oregon Supreme Court, the state made no distinction between the federal and state constitutional provision except to argue that the federal claim was not "substantial". Indeed, the first broad holding in an Oregon Supreme Court civil case that the government may not regulate speech but only its provable adverse effects is found in *City of Portland v. Tidyman*, 306 Or. 174, 759 P.2d 242 (1988), decided three years after this case was filed in the trial court.

Court Justice Hans Linde in a 1970 Law Review Article.[7] Justice Linde's law review argument was made without citation to any authority, and it has never, in twenty years, been relied upon by any court in the way respondents now attempt to use it.[8] While Justice Linde's syllogism has some superficial appeal, it has no foundation in fact or jurisprudence outside the realm of due process of law.[9] It is one thing to say that a claim for violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution is answered where the state courts provide adequate process. It is something else entirely to say that an ongoing denial of rights by a state legislature and state administrative agency with the assistance of the state Attorney General's Office disappears as if it had never occurred when the state court of last resort finally says the state constitution prohibits what the legislative and administrative bodies have done.

Oregon State Troopers were faced with the choice of violating state law or giving up their political rights from 1931 until the Oregon Supreme Court's decision in this case in 1989. The state was never willing on its own to provide relief. Plaintiffs were required to seek counsel and prosecute legal action through the Oregon trial and

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[7] Linde, "Without Due Process", 49 *Oregon Law Review* 125, 134-35 (1970).

[8] Indeed, Justice Linde does not mention this argument in his concurring opinion below.

[9] *E.g., Parratt v. Taylor*, 451 U.S. 527 (1981); *Suess Builders v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982). Indeed Justice Linde's theory was never intended to address the issue of entitlement to attorney fees under Section 1988. Its intention was simply to show that state constitutional claims should be considered before their federal counterparts. Linde, *supra*, n.5 at 134-35.

appellate system in order to obtain relief. It is the purest fiction to say that the State of Oregon denied plaintiffs no federal right.[10]

Respondents make no attempt to square their theory of this case with the legislative history which this Court quoted in *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 570 (1980):

> To the extent a plaintiff joins a claim under one of the [federal civil rights statutes] with a claim that does not allow federal attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. * * * in some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. * * * In such cases, if the claim for which fees may be awarded meets the "substantiality" test, * * * attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that [federal constitutional] claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact".

Id., 448 U.S. at 132 n.15, 100 S.Ct. 76 n.15. (citations omitted). Respondents' argument would make nonsense of this congressional logic. According to respondents, the fact that one has prevailed on the non-fee (state constitutional) claim means that one's federal claim is without

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[10] At least until the trial court issued its decision in July, 1987, plaintiffs had received no help from any state agency. Of course, most of the attorney fees awarded in this case (more than $25,000), are attributable to work done before the trial court issued its decision. The trial court ruled for plaintiffs not only on their Oregon constitutional claim but also on their First and Fourteenth Amendment claims under 42 U.S.C. Section 1983.

merit. If the mere right to relief under the state constitution automatically precludes an award of attorney fees under Section 1988, all of the cases decided under that statute since 1976 have been wrongly decided. They have not. If the Oregon Court had done what the state now argues it did, its violation of Section 1988 would be just as clear as it is in fact.

CONCLUSION

This case presents a central and urgent issue in the litigation of civil rights claims against the states. This record presents the issue clearly, without material factual dispute, and without procedural complication.[11] The Oregon Supreme Court has denied plaintiffs' federal rights and ignored federal law. A writ of certiorari should be granted and the case remanded for reinstatement of the attorney fee awards below and for an award of attorney fees in the Oregon Supreme Court.

Respectfully submitted,

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[11] Respondents' contention that there are discretionary grounds to deny attorney fees in this case (Respondents' Brief at 17-19) ignores this Court's controlling decisions. *E.g. Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). Section 1988 fees are to be awarded "unless special circumstances would render such an award unjust". *Id.* There are no such circumstances in this case.